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THE
LAW OF RAILWAYS

EMBRACING

THE LAW OF CORPORATIONS, EMINENT DOMAIN, CONTRACTS,
COMMON CARRIERS, TELEGRAPH COMPANIES, EQUITY
JURISDICTION, TAXATION, THE CONSTITUTION,
RAILWAY INVESTMENTS, &c.

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PART VIII.

**THE LAW OF COMMON CARRIERS OF GOODS
AND PASSENGERS.**

VOL. II. — 1



PART VIII.

**THE LAW OF COMMON CARRIERS OF GOODS
AND PASSENGERS.**

INTRODUCTION.

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| 1, 2. Distinction between public or common and private carriers. | 3-5. The term "common carrier" defined by reference to the early and the more recent cases. |
|--|---|

WE have not deemed it important to go much into detail in defining the different classes of carriers. The distinction between common carriers and all other carriers is all that seems entirely pertinent to a treatise upon the subject of common carriers. The distinction between common or public carriers and such as are merely private carriers, is sufficiently defined below for ordinary practical purposes. But the distinction is further illustrated in numerous cases in the English and American reports.

1. It is generally considered that where the carrier undertakes to carry only for the particular occasion, *pro hac vice* as it is called, he cannot be held responsible as a common carrier. So, also, if the carrier be employed in carrying for one or a definite number of persons, by way of special undertaking, he is only a private carrier. To constitute one a common carrier he must make that a regular and constant business, or at all events he must for the time hold himself ready to carry for all persons, indifferently, who choose to employ him.¹

2. In an American case,² a common carrier is defined to be one who undertakes for hire or reward to transport from place * to

¹ *Gisbourn v. Hurst*, 1 Salk. 249; *Upston v. Slark*, 2 C. & P. 598; *Gilbart v. Dale*, 1 Nev. & P. 22.

² *Dwight v. Brewster*, 1 Pick. 50.

place the goods of such as choose to employ him. It need not be his principal business, but merely incidental to other occupations, as when the proprietors of a stage-coach, whose chief business was to carry passengers and transport the mail, allowed the driver to carry parcels not belonging to the passengers, it was held to constitute them common carriers, and as such liable for the loss of a parcel thus committed to their agents. This, we apprehend, is the general rule in regard to stage-coach proprietors. They are regarded as common carriers, and the act or agreement of the driver, within the range of the business which he is knowingly allowed to transact, will bind the proprietors.³

3. To constitute one a common carrier, then, he must make it, for the time, a regular employment to carry goods for hire for all who choose to employ him.⁴ The rule embraces the proprietors of stage-wagons and coaches, omnibuses and railways.⁵ The rule will also embrace carters, expressmen, porters, ship-owners, and all who engage regularly in the transportation of goods or money, either from town to town, or from place to place in the same town.

4. The definition of a common carrier requires that the service should be for hire or reward, since without that the same degree of responsibility would not arise. But in regard to private contracts for carrying goods or money, it is not important, after the thing is actually undertaken, whether it be for hire or not. That was the point decided in the celebrated and leading case of *Coggs v. Bernard*,⁶ where it was ruled that if one undertake to carry

³ *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186.

⁴ *Fish v. Chapman*, 2 Kelly, 349, 353.

⁵ *Story Bailm.* § 496, & cases cited. There is an English case, *Liver Alkali Co. v. Johnson*, Law Rep. 7 Exch. 267; s. c. 20 W. R. 663, where a barge-owner, who let his vessels to any one who applied, but only on special contract for the particular service, and never carried goods for any one on the same vessel, and had no particular route to which his vessels were restricted, was nevertheless held to be a common carrier; but, it would seem, with very little reason. A livery stable-keeper, who hires out wagons to all who come, might about as well be regarded as a common carrier. *Brind v. Dale*, 2 Moody & R. 80, is the other way.

⁶ 2 Ld. Raym. 909. It is there said that there are six sorts of bailments. 1. *Depositum*; or the mere deposit of goods to keep without benefit or reward. 2. *Commodatum*, where goods are loaned to one for his convenience. 3. *Loan*ing for hire. 4. *Pawn* or pledge. 5. Goods to be carried or repaired for

goods safely and securely, he is responsible for the damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage. The opinion of *HOLT*, C. J., in this case, forms the basis of the present law of bailments, both in this country and in England.

* 5. There has arisen in the American courts considerable controversy in regard to what precise form of transportation of goods will be sufficient to constitute one a common carrier. But it has been held that railways which take a car for transportation over their road, and take the sole possession and care of it, although it remain on the owner's trucks, are responsible as common carriers.⁷ And in general the same rule is established here as in England, that those who are engaged in the business of carrying for all who apply, indiscriminately, upon a particular route, by whatever mode of transportation they conduct their business, must be regarded as common carriers; while those who undertake to carry in a single instance, for a particular person, not being engaged in the business as a general employment, even for a portion of the time, must be considered private carriers, and as such are only liable for the care and diligence which careful and diligent men exercise in their own business of equal importance.⁸

reward. 6. For the same purpose without reward. In *Shaw v. Davis*, 7 Mich. 318, it was decided that a contract for rafting and running staves does not constitute the party a common carrier, but only an ordinary bailee for hire, which requires only ordinary care and diligence.

⁷ *New Jersey Railroad Co. v. Pennsylvania Railroad Co.*, 3 Dutcher, 100.

⁸ *Pennewill v. Cullen*, 5 Harring. Del. 288. See *Dwight v. Brewster*, 1 Pick. 50. The owner of a vessel usually employed in transporting goods from one port of the United States to another is a common carrier. *Clark v. Richards*, 1 Conn. 64.

*CHAPTER XXVI.

COMMON CARRIERS.

SECTION I.

Duty at Common Law.—Rule of Damages in case of Breach of Duty.

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| <ol style="list-style-type: none"> 1. Responsibility of common carriers, how defined. Inevitable accident.
 a. (a) General rule as to responsibility for carriage of live animals. 2. Force to excuse carrier must be above human control, or that of public enemy. 3. Insurers against fire, except fire caused by lightning. 4. Perils which excuse carriers. Instances. 5. Voluntary exposure of carrier to perils. Carrier must bear the loss, but not of delay, from unknown peril.
 a. (c) Contributory negligence of carrier generally will render him liable. | <ol style="list-style-type: none"> 6. Liable for loss in price, during delay caused by his fault. 7, 8. Actual damages only can be recovered under the English rule. 9. Rule of damages in America more liberal, embracing, it seems, speculative damages. 10. Carrier must pay damage caused by negligence, though remote. 11. Carrier bound to follow instructions, whether given at the time or before delivery. 12. Express carriers who undertake to sell commodities intrusted to them, are common carriers of the money received. 13. Usage to collect and return price will bind carriers. |
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§ 167. 1. CARRIERS of goods for hire indifferently for all persons, such as we have defined as common carriers, have at common law, for a very long time, been held liable for all damage and loss of goods during the carriage, from whatever cause unless from the act of God, which is limited to inevitable accident, or from the public enemy.¹ (a) The exception of the act of God, or

¹ This will not of course embrace losses caused by any default of the owner of the goods. The American cases adopting substantially this definition are very numerous. See *Harrell v. Owens*, 1 Dev. & Bat. 273; *Moses v. Norris*, 4 N. H. 304; *Jones v. Pitcher*, 3 Stew. & P. 135; *Sprowl v. Kellar*, 4 Stew. & P. 382; *Hale v. New Jersey Steam Navigation Co.*, 15 Conn. 539; s. c. 2 Redf.

(a) The rule as to the carriage of live animals is not different from the rule as to the carriage of merchandise. *Lupe v. Atlantic & Pacific Railroad*

inevitable accident, has by the decisions of the courts been restricted to such narrow limits as scarcely to amount to any * relief to carriers. It is in reality limited to accidents which come from a force superior to all human agency, either in their production or resistance. Hence many learned judges have contended that the terms "inevitable accident," which were first suggested by Sir William Jones as a more respectful mode of expressing the act of God, do not in fact have the same import.²

Am. Railw. Cas. 3. It is no excuse for the carrier that a greyhound delivered to him, and for which he gave a receipt, was not properly secured at the time of delivery. He is bound to know what is a proper fastening, and advise the owner if anything more is required. *Stuart v. Crawley*, 2 Stark. 323. But where the dog is fastened in the ordinary mode, and there is nothing to indicate its insufficiency, the case would seem to justify the carrier in trusting to the fastening furnished by the owner, especially where the defendants are not common carriers of dogs. *Richardson v. Northeastern Railway Co.*, Law Rep. 7 C. P. 75. See also *Porterfield v. Humphreys*, 8 Humph. 497, where a horse was lost on a steamboat, by escaping from his fastening, and the carrier was held responsible.

² *Forward v. Pittard*, 1 T. R. 27. Lord MANSFIELD there says, "It appears from all the cases for one hundred years back, that there are events for which the carrier is liable, *independent of his contract*. . . . A carrier is in the nature of an insurer." In defining the act of God, he says, "I consider it to mean something in opposition to the act of man. . . . The law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests." *Richards v. Gilbert*, 5 Day, 415; *McArthur v. Sears*, 21 Wend. 190, 192; s. c. 2 Redf. Am. Railw. Cas. 11; *Trent & Mersey Navigation Co. v. Wood*, 3 Esp. 127, 131; 4 Doug. 287. Lord MANSFIELD here says: "The act of God is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident." See *Sherman v. Wells*, 28 Barb. 403; *Fergusson v. Brent*, 12 Md. 9. LE GRAND, C. J., there says, "The

Co. 3 Mo. Ap. 77; *Atchison & Nebraska Railroad Co. v. Washburn*, 5 Neb. 117; *St. Louis & Southeastern Railway Co. v. Dorman*, 72 Ill. 504. Except so far as animals are liable to injury by reason of their propensities. *Mynard v. Syracuse, Binghamton, & New York Railroad Co.*, 71 N. Y. 180; *Bamberg v. South Carolina Railroad Co.*, 9 S. C. 61; *McCoy v. Keokuk & Des Moines Railroad Co.*, 44 Iowa, 424; *South & North Alabama Rail-*

road Co. *v. Henlein*, 52 Ala. 606. But *contra*, *Baker v. Louisville & Nashville Railroad Co.*, 10 Lea Tenn. 304. And see *Louisville, Cincinnati, & Lexington Railroad Co. v. Hedger*, 9 Bush, 645; *Indianapolis & St. Louis Railway Co. v. Jurey*, 8 Brad. 160; *German v. Chicago & Northwestern Railroad Co.*, 38 Iowa, 127; *Myrick v. Michigan Central Railroad Co.*, 9 Bissell, 44.

2. To excuse the carrier, the loss must happen from a strictly superior force, and not a mere human force (unless it be the public enemy), the *vis major* of the civil law and the casuists. (b) And it would seem that it should not only be a superior force, in the emergency, but one which no human foresight or sagacity could have guarded against.³ In one case,⁴ where the subject

act of God must be the direct and immediate cause of the loss to excuse the common carrier, and it is no excuse that it was caused by inevitable accident or produced by the act of God concurring with other agencies." *Sprowl v. Kellar*, 4 Stew. & P. 382. But see *Hill v. Sturgeon*, 28 Mo. 323. In a somewhat recent case, *Read v. Spalding*, 5 Bosw. 395; s. c. 30 N. Y. 630, where goods were damaged by a flood rising higher than ever before, and which it was no negligence not to have anticipated, and from which the goods could not be delivered after the extent of the rise was known, it was held to have occurred by the act of God, unless the carrier was in fault in not having sooner sent the goods to their destination, and if so in fault, then he was responsible. *s. P. Michaels v. New York Central Railroad Co.*, 30 N. Y. 564. See also *Merritt v. Earle*, 29 N. Y. 115.

³ *Colt v. McMechen*, 6 Johns. 160, *per* KENT, C. J.; 1 Smith Lead. Cas. 219, ed. 1847; 268, ed. 1852, note of the American editor; *McArthur v. Sears*, 21 Wend. 190; *McCall v. Brock*, 5 Strob. 119; *Dale v. Hall*, 1 Wils. 281; *New Brunswick Steamboat Canal Transportation Co. v. Tiers*, 4 Zab. 697. Where the loss of goods on board a ship occurred in consequence of the rudders proving internally defective, from some cause unknown to the owner or master, and the vessel had been "lately completely repaired," it was nevertheless held that the carrier was liable. *Backhouse v. Sneed*, 1 Murph. 178. And in all cases the owners of river craft are responsible, not only for their own inattention, want of care, and inexperience, but equally for that of their servants. *Borne v. Perrault*, L. C. 591, and note. And even where the

⁴ *Blackstock v. New York & Erie Railway Co.*, 1 Bosw. 77. But see also *Cox v. Peterson*, 30 Ala. 608; *Hibler v. McCartney*, 31 Ala. 501.

(b) A sudden and extraordinary carrier is not liable for delay caused flood is to be deemed an act of God; by its servants being overpowered but it is for the jury to say, notwithstanding, whether it was so sudden by a mob. *Indianapolis & St. Louis Railroad Co. v. Juntgen*, 10 Brad. 295. Where the goods are only injured, the carrier is bound to deliver them. *Houston & Texas Central Railway Co. v. Harn*, 44 Tex. 628. As to what is act of public enemy, see *Hubbard v. Harnden Express Co.*, 10 R. I. 244.

Nashville & Chattanooga Railroad Co. v. David, 6 Heisk. 261. The

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* was very carefully examined, it was held that the carrier could not excuse himself for delay in transporting goods by showing that the engineers, and other persons in the employ of the company, by combination left his employ and rendered it impracticable to complete his undertaking. Such a result is not to be regarded as the act of God or inevitable accident.

3. Hence carriers are held as insurers against fire, unless caused by lightning.⁵ There are many cases in the books which take such a latitudinarian or speculative view of the extent of injuries by the act of God, as to give the exception a much broader range, as where the foundering of a ship upon a rock in the ocean, not generally known to navigators, and not known to the master, was held a loss from the act of God.⁶ And if a vessel strike on a rock not hitherto known, it will excuse even common carriers, it has been said, but not if it be laid down in any chart.⁷

goods were on board a lighter, being conveyed to the vessel outside the harbor, and were thrown into the water and damaged by an explosion of the boiler, the vessel was held responsible for the loss, these particular goods being included in the bills of lading signed by the master. *Bulkley v. Naumkeag Cotton Co.*, 24 How. 386. This case goes on the ground that the usages of the business requiring the owner of the vessel to employ and pay the lighter-man, the delivery to him was a delivery to the master, and the responsibility of common carrier attached thereupon. And the responsibility of a ferryman as a common carrier for carriages attaches as soon as the same are fairly on the slip or drop of the ferry; and it will not relax because the carriage is driven by a servant of the owner. *Cohen v. Hume*, 1 McCord, 439.

⁵ *Mershon v. Hobensack*, 2 Zab. 372, 379; *Forward v. Pittard*, 1 T. R. 27; *Hyde v. Trent & Mersey Navigation Co.*, 5 T. R. 389; *Gatliffe v. Bourne*, 4 Bing. N. C. 314. And in *Insurance Co. v. Indianapolis & Cincinnati Railroad Co.*, Disney, 480, it is held, that in losses by fire the carrier is *prima facie* liable. But in *Lamb v. Camden & Amboy Railroad Co.*, 46 N. Y. 271, it was held, by a divided court, that they are not *prima facie* liable in such case. See also *Porter v. Chicago, & Rock Island Railroad Co.*, 20 Ill. 407; *Parker v. Flagg*, 26 Me. 181.

⁶ *Williams v. Grant*, 1 Conn. 487.

⁷ *Pennewill v. Cullen*, 5 Harring. Del. 238. And in *Collier v. Valentine*, 11 Mo. 299, it is said that losses from obstructions in river navigation, where no reliable chart exists, are not governed by the same rules as losses by ocean navigation. But in the former class each case must be judged by its own peculiar circumstances. It is, however, no excuse for the loss of goods that the vessel was run into by a steamer in the night and sunk, whereby the goods were lost, provided those in charge of her had not used due care in guarding against such an accident, even where the persons in charge

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* 4. And so of the loss of a vessel by running upon a snag in a river, brought there by a recent freshet.⁸ But these cases have been questioned, and perhaps have not been generally followed. A hurricane or tempest, lightning, and the unexpected obstruction of navigation by frost, have been held to come within the exception to the liability of carriers.⁹

of the steamer were guilty of negligence. *Converse v. Brainard*, 27 Conn. 607. If the fault were solely on the part of the colliding vessel, the carrier is still responsible. *Oakley v. Portsmouth & Ryde Steam Packet Co.*, 11 Exch. 618. In the case of *De Rothschild v. Royal Mail Steam Packet Co.*, 7 Exch. 734, where the carrier received goods in Panama to be by him delivered in London, "the act of God, the queen's enemies, pirates, robbers, fire, accidents from machinery, boilers and steam, the dangers of the seas, roads, and rivers, or any or either of the risks so excepted as aforesaid;" and the goods were secretly stolen from a railway truck in passing from Southampton to London, it was held not to come within the exceptions of loss by robbers or the danger of the roads; since "robbers" meant those who take by violence in opposition to thieves who take covertly, and dangers by roads meant marine roads, or if it could apply to roads by land, it would only embrace perils peculiar to roads, as the overturning of carriages in rough and precipitous places, &c. It was held at an early day that carriers by water could not excuse themselves for loss occasioned by coming in contact with an anchor, to which no buoy appeared to be fastened. *Trent Navigation Co. v. Wood*, 3 Esp. 127. And where damage was done to the goods by water escaping from a steam-pipe cracked by frost, by reason of filling the boiler overnight, the carrier is not excused; for although that had been the common usage, it was the fault of the crew. *Siordet v. Hall*, 4 Bing. 607; s. c. 1 M. & P. 561. It is no excuse that the goods were lost by an accidental fire without the fault of the carrier. *Gilmore v. Carman*, 1 Sm. & M. 279; *Potter v. Magrath*, Dudley, 159. Theft by the crew or others is no excuse. *Schieffelin v. Harvey*, 6 Johns. 170. And even where the loss occurs by the shifting of a buoy at the entrance of the harbor while the ship was absent on her last voyage, it will not excuse the carrier. *Reaves v. Waterman*, 2 Spears, 197.

⁸ *Smyrl v. Niolon*, 2 Bailey, 421; *Faulkner v. Wright*, 1 Rice, 108.

⁹ *Bowman v. Teall*, 23 Wend. 306; *Parsons v. Hardy*, 14 Wend. 215; *Harris v. Rand*, 4 N. H. 259; *Crosby v. Fitch*, 12 Conn. 410. It has been held that although a general bill of lading given by a carrier, containing a general undertaking to carry, is subject, presumptively, to the ordinary exception to the liability of the carrier, of the act of God and the public enemy, it may nevertheless be shown by oral testimony that the undertaking was not even subject to that presumptive exception. *Morrison v. Davis*, *infra*. But, query, whether this legal intendment of the bill of lading is any more subject to explanation and contradiction than are the express provisions of the instrument itself. The carrier must show that the loss or damage accrued from causes within the exceptions to his responsibility, created either by law or the

* 5. And ordinarily, where the negligence of the carrier exposes him to what he might otherwise have escaped, he is responsible for losses thus occurring through the combined agency of his own negligence and inevitable accident, or the public enemy. (c) As where the carrier, without necessity or justifiable cause, deviates

contract of the parties, and where the contract is in writing it speaks for itself. *Cameron v. Rich*, 4 Strobb. 168. And even where the vessel is unseaworthy, or the carrier is otherwise in default, he is not responsible for losses accruing from causes excepted from his undertaking, and in no sense from any defect or default on his part. *Collier v. Valentine*, 11 Mo. 299. Exceptions of the dangers of the river cover such only as are not known, and therefore unavoidable by human care and foresight. *Gordon v. Buchanan*, 5 Yerg. 71.

Loss by pirates is regarded as a loss by the public enemy. *Magellan Pirates*, 25 Eng. L. & Eq. 595; s. c. 18 Jur. 18. See *Bland v. Adams Express Co.*, 1 Duvall, 232. So too where in a civil war the goods are taken by one of the contending armies. *Lewis v. Ludwick*, 6 Cold. 368. The freezing of perishable articles by reason of an unusual intensity of cold is not such an intervention of the *vis major* as excuses the carrier, if the accident might have been prevented by the exercise of due diligence and care on his part. The fact that the carrier has done what is usual is not sufficient to exempt him from a charge of negligence. He must show that he has done what was necessary to be done under all the circumstances. *Wing v. New York & Erie Railway Co.*, 1 Hilton, 235. So, where goods are thrown overboard in a tempest by order of the master. *Gillett v. Ellis*, 11 Ill. 579. The master of a steamboat is not liable for not drying wheat wet by inevitable accident. *The Lynx v. King*, 12 Mo. 272. There is no such invincible necessity that goods carried by wagon should suffer by rain as to excuse the carrier for damage thereby. *Philleo v. Sandford*, 17 Tex. 227.

(c) And so, it would seem, where he is in any way guilty of negligence contributing in any degree to the injury. *Pruitt v. Hannibal & St. Joseph Railroad Co.*, 62 Mo. 527; *Armstrong v. St. Louis, Kansas City, & Northern Railway Co.*, 1 Mo. Ap. 158; *Baltimore & Ohio Railroad Co. v. Sulphur Spring School District*, 96 Penn. St. 65. But such contributory negligence, to charge the carrier, must be in itself a real producing cause, and not a merely speculative negligence which might not have contributed to the injury in the least. *Baltimore & Ohio Railroad Co. v.*

Sulphur Spring School District, *supra*. As to what will be deemed contributory negligence on the part of the carrier, see further *Bills v. New York Central Railroad Co.*, 84 N. Y. 5, where a train load of live stock was delayed by a flood, and the company neglected to afford an opportunity to unload the stock, &c. And see *Fox v. Adams Express Co.*, 116 Mass. 292, and *American Express Co. v. Smith*, 33 Ohio St. 511, as bearing on the liability of an express company as affected by the negligence of the railroad company over whose line the express company carries.

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from the direct or usual course of transportation, and thereby encounters a storm in which water communicates with the cargo, lime, and ignites it, whereby both ship and cargo are lost, he is responsible upon a declaration charging that it was his duty to carry by the usual course without needless deviation.¹⁰ But if his own neglect was not the proximate cause of the peril being incurred, or if the neglect was not one which ordinary foresight or sagacity could have apprehended was exposing the goods to extraordinary peril, he is still excused. As, if by having a lame horse he is longer upon his route, and is thus overtaken by a desolating flood upon the canal, he is not responsible for the consequent loss.¹¹

¹⁰ *Davis v. Garrett*, 6 Bing. 716; s. c. 4 M. & P. 540; *Powers v. Davenport*, 7 Blackf. 497; *Lawrence v. McGregor*, Wright, 193. See also *Myer v. Chicago & Northwestern Railway Co.*, 24 Wis. 566. But if the owner has assumed the custody and control of the goods, although not precisely at the ordinary place of delivery at the end of the route, the carrier will not be held responsible even for an injury which could not have occurred if the delivery had been at the ordinary place. *Cleveland & Pittsburg Railroad Co. v. Sargent*, 19 Ohio St. 438. But where the carrier by railway is compelled, by stress of weather, to leave a portion of his train exposed to frost overnight, he is not obliged to select cars whose contents he is ignorant of, in order to save those whose contents he knows will suffer by the exposure. *Swetland v. Boston & Albany Railroad Co.*, 102 Mass. 276. The burden of proof to show that goods are injured while in custody of the carrier lies on plaintiff, and the carrier is entitled to demand a clear preponderance against him. *Ib.*

¹¹ *Morrison v. Davis*, 20 Penn. St. 171, 175; s. c. 2 Redf. Am. Railw. Cas. 20; s. r. *Memphis & Charleston Railroad Co. v. Reeves*, 10 Wal. 176; *Denny v. New York Central Railroad Co.*, 13 Gray, 481; *Wolf v. American Express Co.*, 43 Mo. 421. The rule is here repeated that carriers, as well as all other bailees, must exercise care and diligence in proportion to the exigency of the circumstances. In the case of *Memphis & Charleston Railroad Co. v. Reeves*, *supra*, the court has put forth some very sound and sensible views, in regard to the effect, as well as the proof or presumption, of diligence on the part of the carrier. That if the loss is shown to have resulted from the *vis major*, it will not be incumbent on the carrier to show that he was guilty of no negligence, but he may rely on the natural presumption of diligence in his favor, until proof is offered on the other side to show negligence on his part. And even then, if his neglect was only the remote cause of the loss, and the proximate cause was the *vis major*, he will be excused.

To require proof of diligence on the part of any one, where negligence would defeat his claim, as courts sometimes do, seems most unreasonable. It seems to be equivalent to requiring proof of all facts established by the common experience of mankind. Diligence is only the normal condition of

* 6. But where a delay in the transportation is caused by inevitable accident, a railway company is liable for injury to the goods, by bad handling, in endeavors to expedite the passage. But it is not liable, of course, for a decline in the price of goods during a delay which was inevitable.¹² But where the decline in price happened during a delay in transportation for which there was no legal excuse, the carrier would, no doubt, be liable. And in an action for not delivering goods in a reasonable time, the party is entitled to recover the value of the goods at the time and place of delivery, and necessary loss and expenses incurred otherwise, if any.¹³

human conduct, the same as health is of the body, or sanity of the mind. Negligence is the exception and not the rule. How contrary then to reason and experience, to require proof of the existence or operation of the general rules, by which all experience is governed and to which it conforms. It would be just as reasonable to require proof, in advance, of the sanity of every witness, before he could be allowed to testify, or of the full age of the testator before allowing his will. The question of the requisite proof of negligence is considerably discussed by the Court of Queen's Bench, in *Welfare v. London & Brighton Railway Co.*, Law Rep. 4 Q. B. 693, where the leading opinions were delivered by the Lord Chief Justice and Mr. Justice BLACKBURN, both of whom are very eminent for learning and ability, and they fully concur in opinion that in determining the legal presumption and the *onus probandi*, in regard to alleged negligence, the judge is to look at the facts presented, in the light of common experience, and consider the ordinary course of transacting such matters in the place and at the time; and to enforce such presumptions as the normal conditions of human conduct would lead one to expect; and that where something different from this is claimed, it is requisite to support such claim by proof. See also *Transportation Co. v. Downer*, 11 Wal. 129.

¹² *Lipford v. Charlotte Railroad Co.*, 7 Rich. 409; *Galena & Chicago Railroad Co. v. Rae*, 18 Ill. 488. And when the cause of delay, as ice or low water, is removed, the duty to transport revives. *Lowe v. Moss*, 12 Ill. 477; *infra*, §§ 189, 191.

¹³ *Nettles v. South Carolina Railroad Co.*, 7 Rich. 190; *Black v. Baxendale*, 1 Exch. 410; *infra*, §§ 189, 191. Where cotton is lost by a common carrier, interest on its value may be assessed by the jury as a part of the damages, in an action against the carrier for the loss. *Kyle v. Laurens Railroad Co.*, 10 Rich. 382. In estimating the damages in an action against the carrier for the loss of the cotton which he undertook to deliver to plaintiff's factors in Charleston, the amount of factors' commissions on the value should not be allowed the defendant in abatement. *Ib.* The carrier is bound to carry in a reasonable time; but this is a question of fact, under all the circumstances, and to be submitted to the jury. *Conger v. Hudson River Railroad Co.*, 6 Duer, 275. But it is said here that the carrier is not responsible for delay caused by the fault of a third party, as a collision with the train of another railway through their

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7. The rule of damages, as laid down by the Court of Exchequer in one case¹⁴ is, that where the carrier fails to deliver in time it is the duty of the owner to sell, directly he receives the goods, at the market prices, and realize his loss; and the difference between the price which he obtains, and that which he would have obtained if the goods had been delivered in time, is the only * measure of damages. This was a case where hops were sent by common carrier, and the consignee refused to accept them on account of not being delivered in time; and the court held the plaintiff could recover no damage on account of the loss of the bargain between the plaintiff and the consignee.(d)

8. And in another case where goods were not received by the consignee until after the season of their sale had passed, it was held the plaintiff could only recover the difference between the market value of the goods at the time they were received and when they should have been received, and that the profits which the plaintiff would have derived from making up these goods into articles of sale and disposing of them could not be taken into account.¹⁵

9. But in an action for not delivering machinery in proper time, the measure of damages was held to be the * value of the use of the machinery during the period of its improper detention,¹⁶ but that under proper averments and notice and proper proof special damages even beyond this might be recovered.¹⁶

neglect. Nor is the company liable for damages occasioned by the loss of a market through delay not excused, this being too speculative and contingent. But most of the cases hold that the owner may recover for any fall in the market price. See *Falvey v. Northern Transportation Co.*, 15 Wis. 129, where it was held that a delay in the transportation of goods to Buffalo, from which place they were to be shipped by steamers on the lake, occurring in November, was, in view of the increased dangers of lake navigation as winter approached, *prima facie* proof of negligence.

¹⁴ *Simmons v. Southeastern Railway Co.*, 7 Jur. n. s. 849; s. c. 7 H. & N. 1002.

¹⁵ *Wilson v. Lancashire & Yorkshire Railway Co.*, 7 Jur. n. s. 862; s. c. 9 C. B. n. s. 632.

¹⁶ *Priestly v. Northern Indiana & Chicago Railroad Co.*, 26 Ill. 205; *infra*, §§ 189, 191.

(d) The shipper may recover for shrinkage in weight of live stock occasioned by delay in transit. *Glasscock v. Chicago & Alton Railroad Co.*, 69 Mo. 589.

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The difference between the last case and some of the preceding, in regard to the rule of damages, seems to be one of policy between the views of the English and American courts, in the one case to enable the owner to realize speculative damages, and in the other to deny all but what is the most obvious actual damage.^(e)

10. And where the cars of a railway company are thrown off the track, by reason of running over one who fell from the train in consequence of having no proper place to stand, it is no excuse for any injury caused to freight.¹⁷

11. Carriers of goods, by express or otherwise, are always bound to follow instructions given by the owner or his agent, unless that becomes virtually impracticable. And instructions given antecedently to the delivery of the goods, but in contemplation of such delivery, on the part both of the owner and carrier, are of the same binding force as if given at the very time of the delivery.¹⁸

12. And where carriers by express undertake to dispose of commodities * intrusted to them, and return the price, they must be regarded as common carriers of the money as well as the goods, and are not relieved of their extreme responsibility upon the receipt of the money, unless there is some contract or understanding allowing them to use the money, and if so, they would become debtors for it upon the receipt of it.¹⁹

13. So, also, where goods are sent by express, with directions to collect the price on delivery, as where the receipt for the goods, signed by the agent of the company, was marked, "356.84, C. O. D.," which the agent testified meant that the company undertook

¹⁷ *Goldney v. Pennsylvania Railroad Co.*, 30 Penn. St. 242.

¹⁸ *Streeter v. Horlock*, 7 Moore, 283; s. c. 1 Bing. 34.

¹⁹ *Harrington v. McShane*, 4 Watts, 443; *Kemp v. Coughtry*, 11 Johns. 107; *Galloway v. Hughes*, 1 Bailey, 553. See *Emery v. Hussey*, 4 Greenl. 407; *Moseley v. Lord*, 2 Conn. 389.

(e) Thus it is held that the shipper may recover for a fall in the market during period of delay in transit. *Newell v. Smith*, 49 Vt. 255; *Illinois Central Railroad Co. v. Cobb*, 72 Ill. 148; *Devereux v. Buckley*, 34 Ohio St. 16. And see *Rankin v. Pacific Railroad Co.*, 55 Mo. 167. See also *Simpson v. London & Northwestern Railway Co.*, Law Rep. 1 Q. B. 274. The loss sustained by the shipper in his general business is not recoverable. *Baltimore & Ohio Railroad Co. v. Pumphrey*, 59 Md. 390.

to collect \$356.34, on delivery of the goods, and return the amount to the consignors, it was held the evidence was admissible and the company bound by the act of their agent.²⁰ But it has sometimes been doubted whether the master of a ship can bind the owners to return the price of commodities shipped, unless there is a usage to that effect.²¹ But such a usage is not uncommon, and will ordinarily bind the owner to such an undertaking on the part of the carrier, although made by his servants.²²

SECTION II.

Railway Companies Common Carriers.

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| 1. Railway companies and others who carry for all who apply are common carriers.
2. Company entitled under English statute to notice of claim before suit brought. | 3. Railway companies also made liable as common carriers of passenger's baggage and of freight.
4. Responsibility of common carrier results from the office, and action may be in tort or contract. |
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§ 168. 1. It was decided at an early day that persons assuming to carry goods upon railways for all who applied were responsible as common carriers, and indeed it is now regarded as an elementary principle in the law that all who carry goods, in any mode, for all who apply are common carriers.¹ (a) And if natural per-

²⁰ American Express Co. v. Lessem, 39 Ill. 312.

²¹ Taylor v. Wells, 3 Watts, 65.

²² Galloway v. Hughes, 1 Bailey, 553. *Infra*, § 170, pl. 10, and notes.

¹ Parker v. Great Western Railway Co., 7 Man. & G. 253; Muschamp v. Lancaster Railway Co., 8 M. & W. 421; Palmer v. Grand Junction Railway Co., 4 M. & W. 749; Pickford v. Grand Junction Railway Co., 12 M. & W. 766; Eagle v. White, 6 Whart. 505; Weed v. Saratoga & Schenectady Railway Co., 19 Wend. 534; Camden & Amboy Railway Co. v. Burke, 13 Wend. 611; Story Bailm. § 500; Angell Carriers, § 78. In the case of Fuller v. Nauga-

(a) Railway companies are bound v. New York, Lake Erie, & Western to haul the cars of other companies. Railroad Co., 24 Am. & Eng. Railw. Peoria & Pekin Union Railway Co. v. Cas. 421. Hence, they are not bound Chicago, Rock Island, & Pacific Railroad Co., 109 Ill. 135. But they are to haul cars so out of repair as to be dangerous to employes. Texas & Pacific Railway Co. v. Carlton, 15 therefore to inspect them. Gottlieb Am. & Eng. Railw. Cas. 350.

sons * have the management and control of a railway, as receivers appointed by a court of equity, they are responsible as common carriers, if they hold themselves out as such, the same as the corporation would have been before it was placed in the hands of receivers.² And a street railway corporation will be responsible as common * carriers, if they allow their drivers and conductors to take, carry, and deliver trunks and parcels for hire. And what is done by the conductors with the knowledge and consent, ex-

tuck Railroad Co., 21 Conn. 557, 570, it is said that in order to charge a railway as a common carrier it is not necessary to allege that it had power under its charter to become a common carrier; but that having assumed the office and duty of common carrier of freight and passengers, it is estopped to deny its obligations therefrom resulting. But a railway may become a common carrier of goods without necessarily becoming responsible for money or bank-bills. That depends on its own usage or consent. *Chicago & Aurora Railroad Co. v. Thompson*, 19 Ill. 578; *Allen v. Sewall*, 2 Wend. 327. The same rule of construction in regard to the liabilities of railways was adopted in *Welling v. Western Vermont Railroad Co.*, 27 Vt. 399, and in *Noyes v. Rutland & Burlington Railroad Co.*, 27 Vt. 110. The citation of cases under this head might be multiplied almost indefinitely. In *Jones v. Western Vermont Railroad Co.*, 27 Vt. 399, it is laid down as the governing principle of the case, that the company is liable even for torts committed by its agents or servants, within the apparent scope of their authority, or in the pursuit of the general purpose of the charter, and where the departure from the general scope of the charter powers is not such as to be notice to all, that the agent is departing from the proper business of the corporation. One of the three last named cases was a case where the railway company so constructed an embankment as to serve the purpose of a dam to create a reservoir for the accommodation of the mill-owners below, whereby the company obtained some indirect advantage in regard to compensation to land-owners, through whose land it was constructing the embankment. The embankment was so defectively constructed that it yielded to the pressure of the water, and caused damage to the proprietors below, by the sudden outbreak of the waters, and the company was held liable for the injury thereby sustained.

In England it is not uncommon to convert railway structures by means of additions into stables, and even dwelling-houses, which the company let to tenants. Such buildings, although subject to the poor-rate, are not regarded as under the supervision of the metropolitan surveyors of buildings as to fire, party-walls, roofs, and the right to order buildings pulled down, forming, as they do, an important and indispensable portion of the railway structures. *North Kent Railway Co. v. Badger*, 30 Law T. 285; s. c. *nom. In re Badger*, 8 Ellis & B. 728; *Russell v. Livingston*, 19 Barb. 346; s. c. 16 N. Y. 515.

² *Blumenthal v. Brainerd*, 38 Vt. 402. A receiver may be protected from an action at law by the order of the court of equity appointing him; but otherwise he is liable the same as if he were not a receiver. *Ib.*

press or implied, of the superintendents, will bind the company.³ Steamboats which carry freight and parcels for all who apply are responsible as common carriers.⁴ And a wagoner who does the same is responsible as a common carrier, even when he does not make that his regular and principal business.⁵ And where one employed his boat to carry his own cotton, and occasionally carried that of his neighbors, it was held he was responsible as a common carrier, and bound by the act of his captain in taking freight, although applications for that purpose were usually made to himself.⁶ So a boatman employed in the transportation of property on the canals is a common carrier.⁷ And public ferrymen are regarded as common carriers.⁸ One who holds himself out as a common carrier, ready to undertake for all who call, is a common carrier on his first trip, as much as after his business has settled into a fixed usage.⁹ But one who is employed with his ship to carry a single load of grain for an agreed price, and who had not offered his vessel for public use, or held himself out as a common carrier, is not responsible as such.¹⁰

2. Some of the English statutes require notice of any claim against railway companies, for default in any undertaking under their charters before suit brought. But under such statutes it has been held that no such previous notice is necessary where the act complained of is negligence in carrying goods or passengers, this not being a suit for anything done under the act within the meaning of the statute requiring notice.¹¹ But it is held that

³ *Levi v. Lynn & Boston Railway Co.*, 11 Allen, 300.

⁴ *Orange Bank v. Brown*, 3 Wend. 158.

⁵ *Gordon v. Hutchinson*, 1 Watts & S. 285; *Chevalier v. Strahan*, 2 Tex. 115.

⁶ *McClure v. Richardson*, 1 Rice, 215.

⁷ *Arnold v. Halenbake*, 5 Wend. 33.

⁸ *Babcock v. Herbert*, 3 Ala. 392.

⁹ *Fuller v. Bradley*, 25 Penn. St. 120; *Kiston v. Hildebrand*, 9 B. Monr. 72; *Simmons v. Law*, 8 Bosw. 213.

¹⁰ *Allen v. Sackrider*, 37 N. Y. 341. A mere tug boat engaged in towing is not responsible as a common carrier. *Hays v. Miller*, 11 Am. Law Reg. n. s. 370; *Brown v. Clegg*, 63 Penn. St. 51.

¹¹ *Carpue v. London & Brighton Railway Co.*, 5 Q. B. 747; *Palmer v. Grand Junction Railway Co.*, 4 M. & W. 749. Proof of the delivery of goods to a common carrier, and of a demand and refusal of the goods, or of their loss, throws upon the carrier the burden of showing some legal excuse. *Alden v. Pearson*, 3 Gray, 342.

where * the action was brought to recover the excess of charges for carrying goods above what was charged others for similar service, the company were entitled to notice of the claim before action.¹²

3. By the English statute, the Railways Clauses Act, railways, stage-coach proprietors, and other common carriers of passengers, their baggage and other freight, are put upon precisely the same ground, both as to liability and as to any protection, privilege, or exemption. The same rule obtains in this country, except, perhaps, that inasmuch as this mode of transportation is infinitely more perilous to the lives of passengers, a proportionate degree of watchfulness is demanded of the carriers of passengers in this mode. But this is but extending a general principle of the law to this particular subject; to wit, that care and diligence are relative terms, and the degree of care and watchfulness is to be increased in proportion to the hazard of the business.¹³

4. It has long been settled that the responsibility of common carriers results not from any contract, or from any implied undertaking or understanding between the parties, but from the nature of the office or business; and that the declaration may be in form *ex delicto* as well as *ex contractu*, and that in the former case a verdict may pass against some of the defendants and in favor of others.¹⁴

¹² *Kent v. Great Western Railway Co.*, 4 Railw. Cas. 699; s. c. 3 C. B. 714. This action is similar to *Parker v. Great Western Railway Co.*, 3 Railw. Cas. 563; s. c. 7 Man. & G. 253; 7 Scott, N. R. 835. In these cases it was held that the taking of tolls is an act done in the execution of charter powers.

¹³ *Commonwealth v. Power*, 7 Met. 601; *Jencks v. Coleman*, 2 Sumner, 221; *Camden & Amboy Railroad Co. v. Burke*, 13 Wend. 611; *Pardee v. Drew*, 25 Wend. 459. Carriers from places within the realm to places without are subject to the same liability as carriers who carry only within the realm. *Crouch v. London & Northwestern Railway Co.*, 25 Eng. L. & Eq. 287; s. c. 14 C. B. 255.

¹⁴ *Pozzi v. Shipton*, 8 A. & E. 963; *Bretherton v. Wood*, 3 Brod. & B. 54; *Hannibal Railroad Co. v. Swift*, 12 Wal. 262.

*SECTION III.

Liability for Parcels carried by Express and for Acts of Agents.

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| <ol style="list-style-type: none"> 1. Carriers, who allow servants to carry parcels, are liable for loss. 2. Importance of making railways liable for acts of agents. 3. Allowing perquisites to go to agents will not excuse company. 4. Owner of parcels, carried by express, may look to company. 5. May sue subsequent carrier, guilty of default. 6. European railway companies are express carriers. 7. Express companies responsible as common carriers. 8. So are companies that carry parcels or baggage from one city or depot to another. 9. Omnibus and railway companies common carriers <i>ex vi termini</i>. 10. Express companies held to deliver to consignee. 11. Extent to and mode in which express companies may restrict their responsibility. 12. Agent authorized to procure goods competent to bind the owner by conditions accepted by him. | <ol style="list-style-type: none"> 13. Express company bound for safe carriage over its line, and safe delivery to the next carrier, and in many cases for safe delivery at the point of destination. 14. Excused only on the ground of a clear stipulation to that effect by the shipper, and in a particular reasonable and not against good morals or good policy. 15. Express carriers must deliver at the earliest moment in regular business hours. 16, 17. Restrictive limitation in paper drawn and signed by company alone, construed most strongly against company. 18. Inconvenience no excuse for omitting personal delivery. 19. Consignee of goods to be paid for on delivery, entitled to inspect goods. 20. Notice brought home to the other party will in general control the the carrier's responsibility, except for negligence. |
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§ 169. 1. It may perhaps be assumed, that upon general principles common carriers who allow their servants, as the drivers of stage-coaches and the captains of steamboats, or the conductors of railway trains, to carry parcels, are liable for their safe delivery, whether they themselves derive any advantage from the transactions or not. Our own views upon this subject were expressed in a case in Vermont :¹—

¹ Farmers' & Mechanics' Bank v. Champlain Transportation Co., 23 Vt. 186, 203, 204; s. c. 2 Redf. Am. Railw. Cas. 52. But it is said by some of the elementary writers and by some judges, that if such servant is allowed to do this, as a mere gratuity to him of the perquisites, and this is known to those who employ him, his principals are not liable for his default. 1 Parsons Cont. 656; King v. Lenox, 19 Johns. 235. This was a case where the

*“ It seems to us that when a natural person, or a corporation whose powers are altogether unrestricted, erect a steamboat, appoint a captain and other agents to take the entire control of their boat, and thus enter upon the carrying business from port to port, * they do constitute the captain their general agent, to carry all such commodities as he may choose to contract to carry, within the scope of the powers of the owners of the boat. If this were not so it would form a wonderful exception to the general law of agency, and one in which the public would not very readily acquiesce.

2. “ There is hardly any business in the country where it is so important to maintain the authority of agents as in this matter of carrying, by these invisible corporations, who have no local habitation, and no existence or power of action except through these same agents, by whom almost the entire carrying business of the country is now conducted. If, then, the captains of these boats are to be regarded as the general agents of the owners, — and we can hardly conceive how it can be regarded otherwise, — whatever commodities, within the limits of the powers of the owners, the captains as their general agents assume to carry for hire, the liability of the owners as carriers is thereby fixed, and they will be held responsible for all losses ; unless, from the course of business of these boats, the plaintiffs did know, or upon reasonable in-

owner of a ship freighted her himself, and the master had no authority to take freight from others, and this known to those who employed him. *Walter v. Brewer*, 11 Mass. 99; *Reynolds v. Toppan*, 15 Mass. 370; *Butler v. Basing*, 2 C. & P. 613. But see the opinion of the court, in 23 Vt. 203, on this point.

But see *Chouteau v. The St. Anthony*, 16 Mo. 216. Where the clerk of a steamboat carried money letters as a mere gratuity, it was held that this did not render the proprietors of the boat liable as common carriers, but only as gratuitous bailees, for loss by gross neglect. *Haynie v. Waring*, 29 Ala. 263. But the rule in the text is maintained in *Mayall v. Boston & Maine Railroad Co.*, 19 N. H. 122, and see there the opinion of GILCHRIST, C. J. In a suit against the owners of a steamboat to recover the value of a package of money intrusted to the clerk of the boat, to be transported to another port, it was held that the liability of the carrier in such case is to be determined by an inquiry into the nature and extent of the employment and business in which he holds himself out to the public to be engaged; and that proof of the usage of the clerks of such boats to receive and carry such packages from one port to another without hire, in the expectation that such boat would be preferred by these parties in their shipment of freight, is insufficient to bind the owners. *Cincinnati & Louisville Mail Line Co. v. Boal*, 15 Ind. 345.

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quiry might have learned, that the captains were intrusted with no such authority. *Prima facie*, the owners are liable for all contracts for carrying made by the captains, or other general agents for that purpose, within the powers of the owners themselves, and the onus rests upon them to show that the plaintiffs had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain.²

3. "But it does not appear to us that the mere fact that the captain was, by the company, permitted to take the perquisites of carrying these parcels, will be sufficient to exonerate the company from liability. Their suffering him to continue to carry bank-bills ought, we think, to be regarded as fixing their responsibility, and allowing the captain to take the perquisites, as an arrangement among themselves. But we are aware that the question, with whom was the contract, and to whom the credit was given, will generally be one of fact to some extent."

4. And the general law upon this subject is well stated by the highest tribunal in the country, in an important case by Mr. Justice *NELSON.³ In this case it was considered that the owner of parcels carried by express might look to the responsibility of the company as common carriers, treating the express company as the agents of the owners of property carried, and that they were entitled to sue in their own names upon any contract, express or implied, existing in relation to the things carried, between the express company and the principal carriers.

5. It is upon the same principle that the owner of goods is allowed to sue any of the subsequent carriers in the line of transportation, guilty of a default in duty, although his contract was made with the first carrier, to whom he delivered the goods.⁴ This is indeed but a general principle of the law of contracts, familiar to every lawyer,⁵ that contracts made by or with agents, may be

² *Butler v. Basing*, 2 C. & P. 618.

³ *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344.

⁴ *Sanderson v. Lamberton*, 6 Binn. 129.

⁵ *Lapham v. Green*, 9 Vt. 407; *Young v. Hunter*, 4 Taunt. 582; *Paterson v. Gandasequi*, 15 East, 62; DENMAN, C. J., in *Sims v. Bond*, 5 B. & Ad. 389. But see *Weed v. Saratoga & Schenectady Railroad Co.*, 19 Wend. 534, where the principals, it is said, cannot sue, on a contract made by their agent to carry his trunk and money, for expenses, if the trunk is not their property, but borrowed by the agent. In *Stoddard v. Long Island Railroad Co.*, 5 Sandf. 180,

* enforced by suits in the name of the principal on whose behalf they were made. And there is another principle of law applicable to the subject, which will enable the owner of the goods to maintain an action against any carrier upon whose line loss or injury occurred; i. e., that every carrier is liable *in tort* for his own default, or breach of duty, without reference to the special or express contract in the case.⁶ And where a box containing goods, some of which was the property of one of the plaintiffs and some of another, was delivered to a railway company by a third party on behalf of the plaintiffs, the box being addressed to one of the plaintiffs, and was received by him at the place of destination, but the contents had been abstracted, it was held there was evidence of a joint bailment, in respect of which a joint action might be brought for the loss of the goods.⁷ But it was considered that the mere breaking of the box and abstraction of the contents were not evidence of the commission of felony by the company's servants which could be submitted to the jury, although shown to have occurred while in the charge of the company.⁷

6. In England, and upon the Continent, it is the uniform practice for the companies themselves to carry parcels, by express, or

it was held that the owners of the goods were bound by any special contract between the agents for forwarding and the company on whose trains the goods were forwarded. In *Steamboat Co. v. Atkins*, 22 Penn. St. 522, it was considered that the forwarding merchant had such an interest in a contract made by him for forwarding goods, that he might maintain an action in his own name for a violation of it. But see *King v. Richards*, 6 Whart. 418; opinion of FLETCHER, J., in *Robinson v. Baker*, 5 Cush. 145. See, in confirmation of the rule laid down in the text, *Langworthy v. New York & New Haven Railroad Co.*, 2 E. D. Smith, 195.

But in order to charge the carrier by a delivery to the servant, it must appear that it was the business, or, at least, the practice of the servant, to receive such parcels for carriage, otherwise the carrier is not liable. *Blanchard v. Isaacs*, 3 Barb. 388; *Fisher v. Geddes*, 15 La. An. 14. In *Cronkite v. Wells*, 32 N. Y. 247, it was held, that a delivery of a package to the clerk of the agent of an express company, outside the office, is not a delivery to the company, so as to make them responsible for the loss of the package, before it came into the hands of the agent. And the fact that the clerk was accustomed to receive such packages and receipt for them, or that the former agents of the company were accustomed to receive such packages of the plaintiff outside the office, will make no difference.

⁶ See 1 Chit. Pl. 134.

⁷ *Metcalfe v. London, Brighton, & South Coast Railway Co.*, 4 C. B. N. S. 307, 311.

what is there called the parcels delivery, and also what are there called packed parcels, or bundles of parcels, addressed to different persons, which is here done by others chiefly, under contracts with the company.

7. But it cannot be questioned, we think, that the express companies who receive goods for transportation to remote points, without any special undertaking except what is implied from the manner of accepting the charge, are responsible as common carriers,⁸ (a) and so are also the companies employed by such expressmen to perform the transportation, but not probably without being entitled to claim any exemption from the full measure of their responsibility for care and diligence, which would legally result from any special arrangement between themselves and those from whom they accepted the goods.⁹

⁸ *Mercantile Mutual Insurance Co. v. Chase*, 1 E. D. Smith, 115; *Sherman v. Welles*, 28 Barb. 403; *Baldwin v. American Express Co.*, 23 Ill. 197; s. c. 26 Ill. 504; *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189.

⁹ *Langworthy v. New York & Harlem Railroad Co.*, 2 E. D. Smith, 195. In all such cases, whether such packed parcels are in charge of a general express agent, who makes that his constant employment, between certain points, and who would thereby himself incur also the responsibilities of a common carrier, or of a special agent of the consignees, acting on a single occasion, and who would thereby himself incur only the responsibility of an ordinary agent, in both cases the owners have a right to resort to the responsibility of the company conveying the packages, and to hold them responsible to the full extent of common carriers generally, unless there is some stipulation between the company and the agents from whom they received the goods, that they shall incur a less degree of responsibility. *Baxendale v. Western Railway Co.*, 5 C. B. N. s. 336; *Garton v. Bristol & Exeter Railway Co.*, 7 Jur. N. s. 1234; s. c. 1 B. & S. 112; *Branly v. Southeastern Railway Co.*, 9 Jur. N. s. 329; s. c. 12 C. B. N. s. 63.

The same rule was established in this country, in the very infancy, as it were, of transportation by express companies, in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; s. c. 2 Redf. Am. Railw. Cas. 34, where the subject was fully discussed. The leading opinion of the court was here delivered by Mr. Justice NELSON, and concurred in by Chief Justice TANEY and Justices McLEAN and WAYNE. Some of the other judges concurred in the result, but on other grounds, and others dissented, but chiefly on the ground of want of jurisdiction in the court, the suit being instituted in admiralty. This case must be considered as the leading American case in

(a) And it makes no difference are carried. *United States Express Co. v. Backman*, 28 Ohio St. 144. the conveyance by which the goods

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* 8. Such companies as follow the business of carrying parcels between New York and Brooklyn, and such as carry the baggage * of passengers from one depot to another in the city of New York, are common carriers and liable as such.¹⁰

9. And it has been said that the courts are justified in assuming that the owners of omnibus lines are common carriers *ex vi termini*, and without any distinct evidence upon the point.¹¹ And railways are regarded as common carriers, although not so named in their charter.¹²

10. One of the distinctive characteristics of this mode of transportation is, that the companies, whether their line is by land or by water, or partly of each, undertake to deliver to the consignees, in the same manner all common carriers by land did, before rail-

regard to the duties of railways and steamboats, in the transportation of express packages while in charge of the express agent. The package in question, in this case, containing specie to a large amount, had been intrusted to one H. who was engaged in carrying "small packages of goods, specie, and bundles of all kinds, daily, for any persons choosing to employ him, to and from the cities of Boston and New York, using the public conveyances between those cities as the mode of transportation." He had entered into an agreement with the defendants by which he was allowed to transport on their steamers his crate of parcels, "contents unknown;" the crate and its contents to be at all times at H.'s risk, and the company "not, in any event, to be responsible, either to him or his employers, for the loss of any goods or other things transported under the contract." Public notice was required to be given by H. to this effect, and he was also required to insert this condition, exempting the steamboat company from responsibility, in the receipt which he gave for goods transported by him on their boats. It was held that the general owner of specie who has employed an expressman to transport it for him, may maintain an action against the carriers employed by such expressmen, and who are the proprietors of a steamboat on which the same is transported, for its loss, through the fault of such proprietors, or their agents; that in such cases, however, the rights of the general owner are controlled by a valid contract between the expressmen and the carriers employed by him, but that a stipulation in such contract, that the carriers are not to be responsible in any event for loss or damage, cannot be construed to exonerate them for losses caused by their own want of ordinary care. These propositions have not been seriously questioned or essentially qualified in the subsequent cases, and the rule is now firmly established in most of the states. *Buckland v. Adams Express Co.*, 97 Mass. 124. See also *Southern Express Co. v. Newby*, 36 Ga. 635.

¹⁰ *Richards v. Westcott*, 2 Bosw. 589.

¹¹ *Parmelee v. McNulty*, 19 Ill. 556.

¹² *Chicago & Aurora Railway Co. v. Thompson*, 19 Ill. 578.

ways came into general use,¹³ it being now well established, that in the ordinary railway transportation, by common carriers of goods, there is no obligation after the goods reach their appointed destination, but to put them safely in warehouse.¹⁴ It was mainly to remedy this defect in railway transportation of parcels of great value in small compass, that express companies were first instituted in America. That these companies are to be held ordinarily to personal delivery has been so often decided, as scarcely to require the citation of cases.¹⁵

11. Very important questions constantly arise in the courts, in regard to the extent of the limitation of the responsibility of these companies, by reason of conditions of that character, inserted in their receipts or bills of lading, given at the time of accepting * parcels for transportation. These limitations or conditions are binding to the same extent as in the case of other carriers.¹⁶ (b) It will be seen by reference to the discussion of the point,¹⁶ that

¹³ *Infra*, § 175, and cases cited.

¹⁴ *Infra*, § 175, pl. 19, and cases cited.

¹⁵ *Baldwin v. American Express Co.*, 23 Ill. 197; s. c. 26 Ill. 504; s. c. 2 Redf. Am. Railw. Cas. 72. But there is a counter duty on the part of the consignee to be ready to receive the goods when they arrive at their destination, if in reasonable hours. And if the delivery is not made by reason of the consignee not being at the proper place of delivery, ready to receive the goods, the carrier is released from his extraordinary responsibility as such, and is thereafter only responsible as an ordinary bailee for safe-keeping, which, in the case of money or bonds, may be in the best safe he can find. *Adams Express Co. v. Darnell*, 31 Ind. 20.

¹⁶ *Infra*, §§ 177, 178, 179.

(b) An express carrier cannot more than other common carriers divest itself of the liability which its fixed legal character gives it. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174. Thus, it cannot by special contract exempt itself from the consequences of its own negligence or misconduct. *Southern Express Co. v. Hunnicutt*, 54 Miss. 566; *Boscowitz v. Adams Express Co.*, 93 Ill. 523; *Vroman v. American Merchants' Union Express Co.*, 5 Thomp. & C. 22. Unless that particular exemption is ex-

pressly agreed to. *Maguin v. Dinsmore*, 56 N. Y. 168. Nor from the consequences of the negligence of the railway company by which its parcels, &c., are carried. *Muser v. American Express Co.*, 1 Fed. Rep. 382; *Muser v. Holland*, 17 Blatch. 412; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174. A limitation expressed in the receipt given for the thing to be carried, if assented to by the shipper, will bind him though he does not sign the receipt. *United States Express Co. v. Haines*, 67 Ill. 137. But a limita-

these limitations must be made in such a mode as 1. Presumptively to have come to the knowledge of the owner of the goods or his agent, authorized to act on his behalf; 2. They must be of such a natural and reasonable character, that the law can recognize them as not inconsistent with good policy and fair dealing, or in other words, as being reasonable.

12. A nice question may sometimes arise, in regard to the effect of a receipt from an express company, containing conditions qualifying the responsibility of the carrier, having become binding on the owner of the goods by reason of being accepted by his authorized agent. As a general rule, the agent to whom the owner intrusts the goods for delivery, must be regarded as having authority to stipulate for the terms of transportation. By this we do not mean the porter or cabman, or mere servant, but the consignee of the goods, or any other agent of the owner, who purchases or procures them for him.¹⁷ In an English case¹⁸ where in the receipt for the goods delivered to the agent intrusted with the goods, under the head "conditions," was written: "No claim for deficiency, damage, or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days from the time they should have been delivered:" and the plaintiff testified: "He was told to sign the paper and did so; he might have seen the word 'conditions,' but did not read them, and was not told what they were;" and one of the packages was not delivered, and was not called for within seven days of the time it should have been delivered; it was held there was nothing to rebut the presumption, arising from the signature of the paper by the plaintiff, that he understood the contract was subject to the conditions; and they were considered just and reasonable within the statute.

13. It is an important practical question, how far express companies are responsible for the delivery of goods at their point of * destination, when the line consists of several independent com-

¹⁷ *London & Northwestern Railway Co. v. Bartlett*, 7 H. & N. 400; s. c. 8 Jur. n. s. 58. See *Buckland v. Adams Express Co.*, 97 Mass. 124; *Perry v. Thompson*, 98 Mass. 249.

¹⁸ *Lewis v. Great Western Railway Co.*, 5 H. & N. 867.

tion will not bind him, where the want of knowledge of any such limitation is not given until after the shipment, and where the proof shows *American Express Co. v. Spellman*, 90 Ill. 455.

panies. We see no reason why there should be any legal distinction in regard to this point, between express and other classes of common carriers. But in America, where the English rule of holding common carriers generally responsible for the ultimate delivery of parcels beyond their own line does not obtain, the practical inference, resulting from the manner of transacting the business, will often be of importance, as indicating the natural expectation and probable understanding of the parties, to be gathered from the transaction whether it become a question of construction, resulting from the attending facts and circumstances, or remain a pure matter of fact to be judged of by the jury. Where there is a business connection between the different companies, although not amounting to an entire consolidation of interest, it is natural and proper the court should hold the first company responsible to the same extent as in other cases of common carriers of goods or passengers' baggage.¹⁹ And where the receipt given by the express company contains an unqualified stipulation to deliver to the consignee, describing his place of residence or business, the first company will be bound to deliver according to the stipulation. And where the cost of transportation throughout the entire route is paid to the first carrier, that will naturally raise an implication to perform the carriage paid for, unless some limitation of responsibility is specially stated in the receipt or bill of lading. (c) But in general the undertaking of an expressman is to be construed like that of other carriers, to carry safely to the end of his route, and deliver, in like good condition as received, to the next carrier upon the line,²⁰ (d) with proper directions.

¹⁹ *Infra*, § 180, pl. 4, notes 11, 12, and cases cited. Where an express company received from the plaintiff a parcel marked for a point beyond its own line, but that not known to plaintiff, and gave a receipt therefor, the freight to be paid on delivery, and the same was lost on the line of a connecting company, the first company was held responsible. *Mosher v. Southern Express Co.*, 38 Ga. 37.

²⁰ *Infra*, § 180, and notes and cases cited; *id.* pl. 6, note 15, pl. 7, note 16; *Northern Railroad Co. v. Fitchburg Railroad Co.*, 6 Allen, 254.

(c) *St. John v. Express Co.*, 1 Woods, 612; *Adams Express Co. v. Wilson*, 81 Ill. 339. But see *Hadd v. United States & Canada Express Co.*, 52 Vt. 335. (d) *Hadd v. United States & Canada Express Co.*, 52 Vt. 335. See *ada Express Co.*, 52 Vt. 335. See *Gibson v. American Merchants' Union Express Co.*, 3 Thomp. & C. 501; *Snyder v. Adams Express Co.*, 63 Mo.

14. There can be no question, express companies may claim the same exemption and the same indemnity as other carriers, on the ground of bad package, the dangerous nature of the articles, and the want of proper notice at the time of receiving them.²¹ And the courts have recently manifested a disposition, in some states, to hold a firmer hand upon common carriers, in regard to the general tendency to reduce their common-law responsibility, by means of general notices or somewhat covert conditions in their bills of lading, to the same standard as that of ordinary bailees. It seems always to have been held in Ohio, that common carriers could not by general notices brought home to the owner of goods and not objected to by him at the time, so restrict their responsibility as to excuse themselves for just and reasonable liability for the ordinary hazards of the business.²² And in Massachusetts it has been declared that a common carrier cannot by general notice exonerate himself from his legal responsibility, or fix a limit beyond which he shall not be held liable.²³ The result of all which seems to be, that the courts are ready to allow express companies, and all common carriers, to make reasonable regulations in regard to the mode of conducting business with their employers, as to notices, insurance, and the rate of compensation; but they do not favor the repeal of the common-law responsibility of common carriers, unless when it is clear that the employer has understandingly and freely stipulated for such exemption. In a case²⁴ in Missouri it was declared to be the *prima facie* duty of all carriers to carry safely and deliver to the con-

²¹ *Infra*, § 186, and cases cited.

²² *Graham v. Davis*, 4 Ohio St. 362. *Scott, J.*, in *Welsh v. Pittsburg, Fort Wayne, & Chicago Railroad Co.*, 10 Ohio St. 65, citing *Jones v. Voorhees*, 10 Ohio, 145.

²³ *Judson v. Western Railroad Co.*, 6 Allen, 486.

²⁴ *Bartlett v. Steamboat Philadelphia*, 82 Mo. 256.

376. And where the receipt given for the goods stipulates that the connecting carrier shall be liable, like the first, only for delivery to the next carrier, the second company may have the benefit of the limitation. *Levy v. Southern Express Co.*, 4 S. C. 234. Where the company agrees to forward a package to a point beyond its own line, the contract expressly limiting responsibility to that of forwarders, the duty of the company as a carrier ceases with delivery with proper instructions to the connecting carrier. *Reed v. United States Express Co.*, 48 N. Y. 462.

signee, subject to the conditions that this did not require the carrier to go beyond his own line, or perform service inconsistent with the general course of his business.

15. As to the particular time and mode of delivery by express carriers, it has been held, that such carrier should deliver at the place of business of the consignee as early as practicable after arrival, and within the usual business hours.²⁵ (e)

16. In one case²⁶ the following propositions are declared: Restrictions upon the common-law responsibilities of common carriers, for their benefit, inserted in a receipt drawn and signed by them alone, for goods intrusted to them for transportation, are to be construed most strongly against them. If a common carrier, who undertakes to transport goods, for hire, from one place to another, and deliver to address, inserts a clause in a receipt signed by him alone, and given to the person intrusting him with the *goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause does not exempt the carrier from liability for loss of the goods, occasioned by the carelessness or negligence of the employés on a steamboat, owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of transportation; such managers and employés are, in legal contemplation, for the purposes of the transportation of such goods, the agents and servants of the carrier. A receipt executed as above stated will not be construed as exempting the carrier from liability for loss occasioned by negligence in the agencies he employs, unless the

²⁵ *Marshall v. American Express Co.*, 7 Wis. 1.

²⁶ *Hooper v. Wells*, 27 Cal. 11; s. c. 5 Am. Law Reg. n. s. 16; s. c. 2 Redf. Am. Railw. Cas. 247. In the case of *Blossom v. Dodd's Express*, 43 N. Y. 264, it is decided that carriers cannot excuse themselves as such, by giving notice to that effect, unless it appear that the other party knew the terms of the notice when he entered into the contract. See 2 Redf. Am. Railw. Cas. 86.

(e) *American Merchants' Union Express Co. v. Wolfe*, 79 Ill. 430. Where goods are addressed to two persons, delivery to either is delivery to both. *Wells v. American Express Co.*, 44 Wis. 342. The company must deliver to the consignee. Delivery on a forged order to a stranger will not discharge its liability. *American Merchants' Union Express Co. v. Milk*, 73 Ill. 224. And see *Southern Express Co. v. Dickson*, 94 U. S. 549; *Same v. Van Meter*, 17 Fla. 783.

intention to thus exonerate him is expressed in plain and unequivocal terms.²⁷

*17. But there are other cases where a similar restrictive clause, that the carrier "shall only be held responsible as forwarder," *has received a similar construction to the one already stated in the case from California, as having the effect of securing the carrier from all liability except for positive negligence, and thus imposing upon the owner of the goods the burden of proving such default of the carrier.²⁸

18. There seems to be no question made in the recent American cases, that express carriers *prima facie* assume the responsibility of common carriers and are bound, ordinarily, to make personal delivery on arrival at the place of destination.²⁹ And

²⁷ See note to this case, 2 Redf. Am. Railw. Cas. 261; *s. p.* Christenson v. American Express Co., 15 Minn. 270.

²⁸ Kallman v. United States Express Co., 3 Kan. 205.

²⁹ Haslam v. Adams Express Co., 6 Bosw. 235. And where a bank employed an express company to deliver money to one *in person*, from whom the bank supposed it had received a telegram to send the money, and the express company delivered the money to the one who sent the telegram, who claimed to be the consignee, but was a mere pretender, the company was held responsible for the money. American Express Co. v. Fletcher, 6 Am. Law Reg. n. s. 21. But in another case where the consignor of goods had been induced to send goods by common carrier to A., Oswego, in consequence of receiving a letter, signed by that name, ordering the goods and promising to remit the price on receipt of the bill, without knowing or inquiring whether there was any such firm, and the defendants delivered the goods to the person who wrote the letter or his agent, who paid the freight and gave a receipt signed A., and it proved a device to get the goods without paying for them, and that there was no such firm, the defendants were held not liable for the loss. Price v. Oswego & Syracuse Railroad Co., 58 Barb. 599. This latter decision seems more reasonable and just than the next preceding, which seems to require the carrier to look out for the owner better than he does for himself. It is a settled rule of the law, as to common carriers, that the delivery of the goods to a wrong person, having had no communication with the owner, amounts to a conversion, without regard to the question of negligence on his part. Hall v. Boston & Worcester Railroad Co., 14 Allen, 489. But it was held that where property is stolen from the carrier's warehouse, while awaiting the convenience of the owner for its removal, it is competent for the carrier to prove in his defence that he exercised the same degree of care in keeping the property safely that is usually exercised by other railway companies in the vicinity in regard to property similarly situated. But in such cases the burden of proof is on the carrier to show that the loss occurred without fault on his part. Cass v. Boston & Lowell Railroad Co., 14 Allen, 448; Winslow v. Vermont & Massachusetts Railroad Co. 42 Vt.

where the package, being money, was received to be delivered at the bank, at the place of destination, and the carrier arrived after the bank was closed, and carried the money twice to the house of the cashier, and not finding him, brought it back to the owner and offered it to him, but he refusing to accept it, the carrier declined to be further responsible for it, it was held he could not thus excuse himself from his undertaking; after having entered upon its performance, but must deliver the money at the bank in proper business hours and into the hand of the proper receiving officer.³⁰

19. Where goods are sent by carrier to be paid for on delivery, the consignee is entitled to a reasonable time in which to inspect the goods before he accepts them, and the carrier does not make himself responsible for the price by affording reasonable opportunity for such inspection, even where he places them in the hands of the consignee for that purpose, receiving from him the price, as a pledge for their return if not accepted.³¹

20. It seems to be the general sense of the profession, and the almost uniform course of the more recent decisions, that express and other common carriers, may limit and restrict their responsibility as insurers, by general notices brought home to, and impliedly assented to by the owner of the goods, to any reasonable * extent; but that this will not extend any protection to the carrier against any default or misconduct either of himself or his servants.³² And unless it appears that the damage accrued from the excepted risks and without the fault of the carrier, he will be held responsible.³³ The limitations of the bill of lading will bind the shipper, as to the extent of the responsibility of the carrier.³⁴ So also will a receipt given for the goods, at the time of delivery.³⁵ But evidence of a special oral contract at the time of the ship-

700. The delivery to the consignee, to exonerate the express company, must be actual and *bona fide* and not merely colorable, as where the express agent snatched the money the moment it was delivered. *American Express Co. v. Haggard*, 37 Ill. 465.

³⁰ *Merwin v. Butler*, 17 Conn. 138.

³¹ *Lyons v. Hill*, 46 N. H. 49.

³² *Baltimore & Ohio Railroad Co. v. Rathbone*, 1 W. Va. 87. '

³³ *Czech v. General Steam Navigation Co.*, Law Rep. 3 C. P. 14; *Newborn v. Just*, 2 C. & P. 76; *American Express Co. v. Sands*, 55 Penn. St. 140.

³⁴ *Farnham v. Camden & Amboy Railroad Co.*, 55 Penn. St. 53.

³⁵ *Bowman v. American Express Co.*, 21 Wis. 152. But see *Prentice v. Decker*, 49 Barb. 21; *Limburger v. Westcott*, 49 Barb. 283.

ment, the bill of lading not being delivered till some time after, will control the carrier's responsibility.³⁶ But in Georgia it seems to be considered that the common-law responsibility of carriers can only be controlled by express contracts, of which provisions in their receipts are not sufficient evidence.³⁷ But this extreme view is scarcely maintainable.

SECTION IV.

Rights and Duties of Express Carriers.

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| <ol style="list-style-type: none"> 1. Express carriers liable for not delivering to consignee. 2. Contract of local express carrier with railway company construed. 3. Express carrier cannot charge in proportion to value of parcels, and at same time restrict liability. <ul style="list-style-type: none"> a. (b) Insurer, when a carrier of money. 4. Responsibility as common carriers where carriage is beyond end of line. 5. Railway company, statute prohibiting discrimination, cannot charge express carrier higher than others, nor give one such carrier exclusive privileges. <ul style="list-style-type: none"> a. (c) Bound to furnish express carriers the usual facilities and upon equal terms. | <ol style="list-style-type: none"> 6. Express carrier liable for not causing proper protest of bill. 7. Constructive grounds of limiting responsibility to his own route. 8. English statute requires packed parcels to be carried by weight. 9. Delivery to husband of consignee. Statute for the protection of married women. 10. Carrier failing to forward proper directions as to delivery, responsible for consequent loss. 11. Not bound to collect price unless he so undertakes. <ul style="list-style-type: none"> a. (f) Carrier's liability in general for goods sent C. O. D. |
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§ 170. 1. This is a mode of transportation, as already stated, which has come in practice very much, since the general use of railways for transportation. It seems more necessary on account of the rapidity of movement upon such roads, and also the mode in which * business is generally transacted by railway companies, of only delivering at their stations. Express companies, and their agents, as far as we know, receive parcels at their offices, not only at their principal termini in the large towns and cities, but at local offices along the line of their routes, and even send their wagons about the cities and towns to gather up parcels when notified to do so, and adopt a similar course in delivering out

³⁶ *Detroit & Milwaukee Railroad Co. v. Adams*, 15 Mich. 458.

³⁷ *Southern Express Co. v. Newby*, 36 Ga. 635; *Same v. Barnes*, 36 Ga. 532.

parcels at the doors of the dwellings, or places of business, of the consignees. This mode of transacting the business of expresses seems to come in the place of the general carrying business of parcels;¹ or, according * to the definition of the English

¹ In *Stadhecker v. Combs*, 9 Rich. 193, a suit against an express company for the value of a trunk lost, it is said: "A strict application of the law of common carriers is necessary for the protection of the large amount of property committed to the hands of strangers for transportation to distant points, and certainly, from such an application express companies have no claim to exemption." And in *Sweet v. Barney*, 24 Barb. 533, it was held that the party to whom money was sent by express might direct the place and mode of delivery. Hence, a bank in the city, to whom money is sent by bankers in the country by express, being considered the owner of the money, may authorize the same to be delivered at the office of the express company, or at any other place in the city, to any person it may select; and the express company, by making such a delivery, will be relieved of its responsibility, whether it be that of common carrier or forwarder. All the express company is bound to do in such cases is to make such a delivery as will charge the consignee. In the absence of all special provision in such cases it is the duty of the express agent to deliver the money at the bank to the proper officer. And where it is the practice of such companies to deliver packages according to their address, it will be presumed that they assume to deliver all packages committed to their custody in that mode. And in such case, as before stated, the only delivery which will charge the bank or release the express company, is a delivery according to the address of the parcel at the bank to the proper officer. But where the express company delivers the money to a porter at the office, who has usually been employed by the bank to receive such packages, it is not sufficient to discharge the express company unless such delivery was authorized by the bank; and it is incumbent on the express company to prove such authority. This proof may be direct and express, or implied from the acts of the porter, such as receiving money for the bank on other occasions at the express office sent to it in a similar way and a similar address with the knowledge and assent of the bank. If the testimony is sufficient to satisfy the triers of the fact that the bank authorized the porter to receive the money on its behalf, or that, from the manner in which it allowed him to conduct business on its behalf, it was bound to suppose others might understand that he was authorized to act on its behalf, and that the express company did so understand it, it will excuse the company. A tender at a bank, out of known and recognized banking hours, is obviously no tender at all. One might as well make a tender to a merchant at midnight after his store is closed. But it has been held that a tender after sundown, if made personally to the party at his place of business, is good. *Startup v. Macdonald*, 6 Man. & G. 593. So, too, a tender at a bank, while open and the officers in, may be good, although after banking hours. See *Marshall v. American Express Co.*, 7 Wis. 1. The clause in an express agency's receipts "To be forwarded to our agency nearest or most convenient to destination only," will not dispense with delivery to

Carriers' Act, of things of great value in small compass. And, as before stated, there can be no question that, upon general principles, these expresses are liable as common carriers, and liable, according to the course of their business, and the expectation thereby created in the mind of their employers, for all parcels received into their wagons, and bound to make personal delivery to the consignees or to their agents, at their places of business, or, in default of having such, at their residences. (a) And since the establishment of such expresses, it will be presumed that one who expects a parcel to be delivered personally, or notice given to the consignee, will intrust it only to the express company upon the route, and his giving it in charge of the general freight agent of the railway is equivalent to an express contract, almost, that the company shall only be bound to such a delivery as is according to their general course in this department of their business. For, by delivering the parcel to the express company, the owner not only secures the responsibility of the express company as his agent, but also of the railway company, unless they have stipulated with the express company for some exemption from their ordinary common-law liability as carriers, in the transaction of the business of the express company, and this is made known to, or might on inquiry be learned by, the owner of goods so sent. These propositions result from the elementary principles of the law of bailment, and are recognized by the best-considered cases.² And valid excuse must result from some agency beyond the control of the agents and employes of the carrier. And therefore, as before stated, a railway company is liable for loss resulting from the delay of transportation caused by the refusal of the company's engineers to work, although such conduct could not have been foreseen, and the places of such engineers * supplied in time to save the loss.³ Under a written contract, by which the owners

the consignee by such agents as the company habitually employs according to the usages of the business. But where a parcel is addressed to the consignee at a large establishment, the delivery of the same at the office or counting-room to the clerks in charge, according to the usual practice of the company in such cases, is sufficient to exonerate the carrier without giving express notice to the consignee. *Sullivan v. Thompson*, 99 Mass. 259.

² *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344.

³ *Blackstock v. New York & Erie Railway Co.*, 20 N. Y. 48; *supra*, § 167, pl. 2.

(a) See *supra*, § 169.

of a steamboat bound themselves as common carriers to deliver certain goods at a specified point, the loss of the goods by fire, after having been deposited in a warehouse at the highest point to which, on account of the low stage of the water, the boat could ascend the river, does not excuse the defendant's failure to deliver the goods at the specified place.⁴ And carriers of cotton, which was stored on the forecastle with the sacking torn and the cotton exposed, and there set on fire by carrying torchlights upon the boat, according to the usual custom,⁵ were held liable for its loss. Indeed, in all cases where it is shown that goods are put in charge of a common carrier, in apparently good condition, and are found subsequently in a damaged state, the carrier is *prima facie* responsible for the loss.⁶ In an important case which recently occurred,⁷ where a package of money was delivered to an express company to carry into another state, for the consignee to whom it was to be delivered, it was held, that where the company had been accustomed to enter all packages upon a delivery book, and to take a receipt upon delivery, the fact that no such entry has been made upon the delivery book tends to rebut any presumption of delivery; that express companies are responsible as common carriers, and are ordinarily to be regarded as undertaking to make delivery to the consignee, and that they are *prima facie* liable unless such delivery is made, except where the business is too limited to justify keeping a messenger to perform such act of delivery, and in such cases that prompt notice should be given to the consignee of the arrival of the package; that the undertaking of such express company ordinarily implies an actual delivery to the proper person at his place of business; and in no other way can the company discharge itself of responsibility except by proving performance of its undertaking, or that it has been prevented by the act of God or of the public enemy. And in the same case in a later volume,⁸ it was held that the company

⁴ Cox v. Peterson, 30 Ala. 608.

⁵ Hibler v. McCartney, 31 Ala. 502.

⁶ Fenn v. Timpeon, 4 E. D. Smith, 276; Hall v. Cheney, 36 N. H. 26.

⁷ Baldwin v. American Express Co., 23 Ill. 197; s. c. 2 Redf. Am. Railw. Cas. 72.

⁸ American Express Co. v. Baldwin, 26 Ill. 504; s. c. 2 Redf. Am. Railw. Cas. 72.

will be responsible for the loss, when it appears that it occurred from not keeping the *key of the company's safe securely, whereby access was obtained by one who stole the key, and the money by thus gaining admission to the safe. And it was also held that where it appears that the company had sometimes delivered packages before entry upon the delivery book, it must nevertheless be shown that the company had in fact actually delivered the parcel in question, or at least offered to deliver it, at the proper time and place, in order to relieve itself from responsibility as common carriers.

2. It was held, in one case,⁹ in the English Court of Exchequer, that a contract between a railway company and an individual, that he should, for a twelvemonth, carry all grain, merchandise, &c., between certain points to and from the railway, at a given price, he providing wagons, horses, drivers, tarpaulins, and other plant necessary for the cartage, and agreeing to be responsible for all money due to the company for the carriage of goods carted by him for such persons as had not ledger accounts with the company, and to observe all the regulations of the company, might be terminated at any time by the company, even after such person had provided himself with the requisite furniture to carry the contract into effect, and entered on its performance; the company having, in the mean time, made an arrangement with another railway, by which cartage between these points became unnecessary.

3. Where an express company restricted their liability in the receipt given for a package of bonds, with coupons attached, valued at \$40,000, and charged for carrying a very high rate in proportion to the size or weight of the package, even beyond the usual rate of insurance, it appearing that no extraordinary care was bestowed on parcels of high value, it was held that there was no reason for enhancing the charge for transportation in proportion to the value of the articles carried, where the company

⁹ *Burton v. Great Northern Railway Co.*, 9 Exch. 507; s. c. 25 Eng. L. & Eq. 478. But the verdict in this case at the trial before MARTIN, B., was for the plaintiff, on the ground that the company impliedly bound itself not to do anything during the term the contract was to run, to deprive the plaintiff of the ordinary cartage between those points. And such a decision would seem quite as satisfactory as that of the full bench.

excused themselves from full responsibility, and that the charge was exorbitant and unreasonable.¹⁰ (b)

* 4. Express carriers who take parcels marked for distant points, and where they have no agents, have sometimes been held not responsible, as common carriers, to carry safely to the end of the route, and there deliver safely, but only for ordinary care as forwarders;¹¹ but this is not the present most approved rule on the subject. They may, however, restrict their liability by express contract.¹¹

5. Where the statute requires a railway company to carry for all who apply, and upon equal terms, they have no right to impose increased prices upon express carriers who send freight by the company's trains, in aggregate quantities, made up of small parcels, directed to different persons.¹² Nor can railways impose their own terms for freight by including an extra and unreasonable charge for the receipt and delivery of freight and parcels, about the towns adjoining the stations.¹² So, too, a contract giving the exclusive privilege to one express company of transportation in the passenger trains is illegal and void, being in contravention of the statute requiring equal privileges and equal charges to all.¹³ (c)

¹⁰ *Holford v. Adams*, 2 Duer, 471. But where the receipt given by the express company contained a condition that "the holder shall not demand above the sum of fifty dollars, the sum at which the article is hereby valued, unless otherwise herein expressed, or unless specially insured and so specified in the receipt," and where no insurance was made and there was nothing to vary the clause in the receipt, it was held the carriers were liable only to the extent of fifty dollars. *Newberger v. Howard & Co.'s Express*, 6 Phila. 174.

¹¹ *Hersfield v. Adams*, 19 Barb. 577, where it is held that express agents who transport parcels by other lines of common carriers, are not themselves common carriers, but only forwarders, and liable only as such. But see *Read v. Spaulding*, 5 Bosw. 395. See also *Place v. Union Express Co.*, 2 Hilton, 19, where the case first cited is disapproved.

¹² *Pickford v. Grand Junction Railway Co.*, 10 M. & W. 399.

¹³ *Sandford v. Catawissa, Williamsport, & Erie Railroad Co.*, 24 Penn. St. 378. And where an express company carried on its business within the state of Indiana, without complying with the statute of March 5, 1855, regulating such companies, it was held that its business thereby became illegal,

(b) As carriers of money, express United States Express Co. *v.* Hutchins, 67 Ill. 348.

and nothing can excuse them but an (c) Railway companies are bound to furnish the usual and necessary

6. Where an express company received, for collection for a reward, a bill of exchange drawn in one state and payable in another, and which therefore required demand of the acceptor and protest on the day of payment, in order to charge the drawer or indorsers, but which the express agent caused to be made one * day before the maturity of the bill, whereby the other parties were released, the acceptor being insolvent, it was held that the company thereby became responsible to the holder of the bill for the amount.¹⁴ (d)

and that the company could not maintain an action on a bond given with surety by one of its servants or agents for faithful service and just account of all receipts. *Daniels v. Barney*, 22 Ind. 207. But it was here held, that where money had been paid by the party to an illegal transaction to an agent of the principal, the latter might recover the same, as the implied obligation of the agent to pay the money to his principal did not result from the illegal transaction. This question received very careful consideration in *New England Express Co. v. Maine Central Railroad Co.*, 9 Am. Law Reg. n. s. 728; s. c. 57 Me. 188. The court came to the conclusion, that both at common law and under the statute of that state, an action would lie against a railway company for refusing to carry express matter for one company, on the ground of an exclusive contract with some other company. *s. P. Audenreid v. Philadelphia & Reading Railroad Co.*, 68 Penn. St. 370.

¹⁴ *American Express Co. v. Haire*, 21 Ind. 4. So, too, express-carriers will be held responsible for the loss of a bill through their delay in returning it, by reason of the insolvency of the drawee. *Whitney v. Merchants' Union Express Co.*, 104 Mass. 152.

facilities for the transaction of the business of express companies. *Wells v. Oregon Railway & Navigation Co.*, 18 Fed. Rep. 517. And upon equal terms to all express carriers. *Southern Express Co. v. St. Louis, Iron Mountain, & Southern Railway Co.*, 10 Fed. Rep. 210; *Wells v. Oregon Railway & Navigation Co.*, 16 Am. & Eng. Railw. Cas. 87. But not to furnish facilities different from such as it furnishes the general public. *Sargent v. Boston & Lowell Railroad Co.*, 115 Mass. 416. See *St. Louis, Iron Mountain, & Southern Railroad Co. v. Southern Express Co.*, 118 U. S. 8. Whether it makes any difference that the company carry-

ing on business in several states, has not complied with the local laws relating to express companies, see *Wells v. Northern Pacific Railroad Co.*, 18 Am. & Eng. Railw. Cas. 440. But the federal circuit court will enjoin the railway company from interfering with the facilities of such express companies doing business over its road. *Fargo v. Redfield*, 18 Am. & Eng. Railw. Cas. 463. And they have no right to open and inspect packages or safes in charge of an express carrier. *Southern Express Co. v. St. Louis, Iron Mountain, & Southern Railway Co.*, *supra*.

(d) So the company is liable where by any negligence it fails to make

7. It seems to be a well-recognized rule in the American courts, applicable to express carriers, as well as other common carriers, that the receipt of a parcel of any kind destined to a remote point, and which, in the ordinary course of the transaction of the business, the first carrier will have to intrust to others with whom he holds no special business relations, unless the first carrier make some special and express undertaking, will only make him responsible as a common carrier to the termination of his own route in the direction of the transportation and delivery to the next carrier in the line; and this rule will exonerate a carrier who gives his receipt for a bill of goods, for collection, from a person beyond his route, in the absence of any special contract for the faithfulness of other carriers, to whom, in the ordinary course of the business, the bill was entrusted, and who failed to pay over the amount collected.¹⁵ (e)

8. The English statute requires railways to carry parcels directed to one consignee according to the gross weight, although they have a label showing several destinations after delivery.¹⁶

* 9. Under the Massachusetts statute for the protection of the property of married women, it was held, that where a man and

¹⁵ *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189.

¹⁶ *Baxendale v. Southwestern Railway Co.*, 12 Jur. n. s. 274; 4 H. & C. 130; s. o. Law Rep. 1 Exch. 137. The case of *Place v. Union Express Co.*, 2 Hilton, 19, presents many interesting points. This was the case of an express company having an arrangement with two connecting lines of road, receiving fruit which was spoiled in transit through delay caused by a continuing inability of the second road to handle the freight as fast as it was delivered by the first. The company stipulated to deliver within a certain time, but it was agreed that it should not be liable for injury occasioned by accidental delays or natural tendency to decay. The court laid down several distinct propositions of law, and in the result held the company liable.

collection. *Knapp v. United States & Canada Express Co.*, 55 N. H. 348. But where it undertakes to collect a check and there is no unreasonable delay, it is not liable for loss resulting from a failure of the bank on which the check is drawn. *Eiswald v. Southern Express Co.*, 60 Ga. 496. *Express Co.*, 2 Mo. Ap. 370; *United States Express Co. v. Backman*, 28 Ohio St. 144. As to fraudulent concealment of value of goods and its effect on the liability of the carrier, see *Maguin v. Dinsmore*, 62 N. Y. 35. And see *Earnest v. Express Co.*, 1 Woods, 573; *Oppenheimer v. United States Express Co.*, 69 Ill. 62.

(e) As to limitation of liability to a certain sum, see *Kirby v. Adams*

* woman came into the Commonwealth for the purpose of being married, and were married, and a few days after the woman, while residing at an inn, sent to a broker in the state from which she came and with whom she had deposited money or property earned by her before the marriage, and directed him to send her a sum of money by an expressman, which he did, with instructions to deliver it to her upon her own personal receipt; but the expressman delivered it to the husband, who absconded with it; that the woman might maintain an action in her own name against the expressman for the recovery of the money, if she had not given her husband authority to receive the money, or represented him as her agent.¹⁷

10. And where goods are sent with instructions to deliver on payment of the price, but are in fact delivered without such payment, and the purchaser becomes insolvent before payment, the party in fault in not forwarding the instructions or not observing them is responsible for the loss.¹⁸

11. But there must be distinct and satisfactory evidence that the carrier understood he was not to deliver the goods until the price was paid. The mere fact that the package was marked "C. O. D.," and that these letters are understood by the initiated to import that the bill for the price is to be paid on the delivery of the goods, will not be sufficient to charge the carrier with the duty of collecting the price of goods committed to him for transportation. There should at least be evidence that the carrier was furnished with a bill of the goods to carry to the consignee, or something satisfactory to show that he understood he was expected to collect the price of the goods.¹⁹ Thus where the bill of lading specified that the carrier should collect the charges specified in the bill, including the price of the goods, on delivery of the same to the consignee, and he omitted to do so, he was held responsible for the same to the consignor.²⁰ (f)

¹⁷ *Read v. Earle*, 12 Gray, 423.

¹⁸ *Hutchings v. Ladd*, 16 Mich. 493; s. c. 2 Redf. Am. Railw. Cas. 77. But see *Gordon v. Ward*, 16 Mich. 360; *supra*, § 167, pl. 13.

¹⁹ *Chicago & Northwestern Railway Co. v. Merrill*, 48 Ill. 425; s. c. 2 Redf. Am. Railw. Cas. 92 and note; *supra*, § 167, pl. 13 and notes.

²⁰ *Meyer v. Lemcke*, 31 Ind. 208. And where a carrier is accustomed to

(f) The consignor is the proper person to sue. The contract is with Keefer, 59 Ind. 263. The liability of

SECTION V.

Responsibility for Baggage of Passengers.

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|---|---|
| <ol style="list-style-type: none"> 1. Railway companies liable as common carriers for baggage. 2. Liability where different companies form one line and sell tickets and check baggage through. 3. Company responsible for actual delivery to the owner. 4. Company not responsible unless baggage given in charge to its servants. 5. Liability results from duty, and not from contract. | <ol style="list-style-type: none"> 6. Company responsible for baggage if servants accept it. What constitutes delivery to company. 7. Not responsible as common carrier after baggage reaches destination. 8. Contract by owner to assume risk does not extend to risk of negligence or wilful misconduct. 9. Disposal of lost baggage. Regulated generally by statute. |
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§ 171. 1. It is an elementary principle in the law, that the carriers of passengers are liable as common carriers for their ordinary baggage, or as it is more commonly called in the English books, luggage.¹ (a) And it is considered that, as railways have

carry grain and return the bags free of charge, he is responsible for the bags as a common carrier, and not as a gratuitous bailee merely. *Pierce v. Milwaukee & St. Paul Railroad Co.*, 23 Wis. 387.

¹ *Brooke v. Pickwick*, 4 Bing. 218; *Hawkins v. Hoffman*, 6 Hill N. Y., 586; *Bennett v. Dutton*, 10 N. H. 481; *Powell v. Myers*, 26 Wend. 591; *Dill v. Railroad Co.*, 7 Rich. 158, 162; *Camden & Amboy Railroad & Transportation Co. v. Burke*, 13 Wend. 611; *Robinson v. Dunmore*, 2 B. & P. 416; *Clarke v. Gray*, 6 East, 564; s. c. 4 Esp. 177. The fare of the passenger includes payment for transporting the baggage. *Dexter v. Syracuse, Binghamton, & New York Railroad Co.*, 42 N. Y. 326. It was held in this case that new clothes and material for clothing for himself and family, but not for others, came within the rule of passenger baggage. *s. p. Wilson v. Grand Trunk Railway Co.*, 56 Me. 60. But if the baggage be delivered to the company at an aftertime from the passage of the owner it must be paid

the company for loss of the goods by fire after arrival at destination, is not affected by the fact that they were sent C. O. D. *Gibson v. American Merchants' Union Express Co.*, 1 Hun, 387. But the company is relieved of liability as a common carrier and holds simply subject to the order of the consignor, where the goods are tendered to the consignee, and he fails to receive them and pay, and notice is given to the consignor. *Same v. Wolf*, 79 Ill. 430. Whether the courts will take notice of the meaning of the letters C. O. D.; see *McNichol v. Pacific Express Co.*, 12 Mo. Ap. 401; *United States Express Co. v. Keefer*, 59 Ind. 263.

(a) The carrier is not liable in *assumpsit* where the baggage is carried

made their * checks evidence in regard to the delivery of baggage, the possession of such check by a passenger is evidence against the company of the receipt of the baggage. In one case, the court say, "It stands in the place of a bill of lading."² (b) And it

for as freight. *Ib.* And it has been held that the fact that the passenger was riding on a free ticket, by which the company was to be excused from all loss or damage, even from its own negligence, was no defence to an action for loss of baggage. *Mobile & Ohio Railroad Co. v. Hopkins*, 41 Ala. 486; *infra*, § 171, pl. 6; § 192, pl. 4, note 11. And by parity of reason where the company accepts baggage to carry for a passenger going in a former train, without requiring additional pay, it should be bound to the same extent as if the baggage had gone with the passenger. The carrier, if for any reason he sees fit to waive his pay, is not in any sense excused from his responsibility, after he enters upon the work. *Coggs v. Bernard*, *supra*, p. 5. And it was so held in *Wilson v. Grand Trunk Railway Co.*, 57 Me. 138.

² *Dill v. Railroad Co.*, 7 Rich. 158. And where the carrier gives public notice that he will not be liable for baggage not checked, this will not excuse him, if at all, where the passenger delivers his baggage on board the carrier's steamboat to a proper agent, but is refused a check, because the person who gives the checks is not present. *Freeman v. Newton*, 3 E. D. Smith, 246. But in *Wilton v. Atlantic Royal Mail Steam Navigation Co.*, 10 C. B. n. s. 453, the plaintiff took passage on board the defendants' ship on the terms of a ticket which stipulated that the company should not be responsible for baggage, goods, or other property, unless a bill of lading was signed therefor, and

free. But an action of tort may lie for a negligent loss. The liability is that of any gratuitous bailee. *Flint & Pere Marquette Railway Co. v. Weir*, 37 Mich. 111. As to loss of baggage checked to right place over wrong line, see *Isaacson v. New York Central & Hudson River Railroad Co.*, 25 Hun, 350; *Fairfax v. Same*, 73 N. Y. 167. The liability of a carrier of baggage contracting without stipulation for limitation of liability, and giving a check to a point beyond the end of its own line, is the same as that of a carrier of goods contracting in the same way. *Louisville & Nashville Railroad Co. v. Weaver*, 9 Lea Tenn. 38. See further *Hawley v. Screven*, 62 Ga. 347; *Wolff v. Central Railroad Co.*, 68 Ga. 653; *Texas & Pacific Railroad Co. v. Fort*, 9 Am. & Eng.

Railw. Cas. 392; *Atchison, Topeka, & Santa Fe Railroad Co. v. Brewer*, 20 Kan. 669. Where baggage is held under a lien for fare, the company is liable for articles taken therefrom. *Southwestern Railroad Co. v. Bentley*, 51 Ga. 311. See further as to liability for baggage, *McCormick v. Pennsylvania Railroad Co.*, 80 N. Y. 353; s. c. 99 N. Y. 65.

(b) The company on sale of a ticket is bound to carry baggage. The check is not a contract for carriage, but a voucher or token by which baggage may be claimed and identified. *Isaacson v. New York Central & Hudson River Railroad Co.*, 94 N. Y. 278. See *Denver, South Park, & Pacific Railroad Co. v. Roberts*, 6 Cal. 333.

has been considered that the admissions of the conductor, baggage-master, and station agent, as to the manner of the loss, made in reply to inquiries by the owner the next morning after the loss, are admissible as evidence against the company.³ And proof that the baggage could not be found when inquired for by the passenger raises a presumption of negligence on the part of the carrier.⁴

2. Where different railways, forming a continuous line, run their cars over the whole line, and sell tickets for the whole route, and check baggage through, an action lies against either company for the loss of baggage.⁵ (c) It is the duty of railway

that each first-class passenger should be allowed twenty cubic feet of baggage free, excepting certain articles, and the ship was lost, together with the plaintiff's baggage, through the negligence of the captain. The plaintiff's luggage consisting of several trunks, was received on board, without any questions being asked about it; the plaintiff neither declaring the contents nor taking a bill of lading, nor being required by any person to do so. The company was excused on the ground that no bill of lading was taken.

³ *Morse v. Connecticut River Railroad Co.*, 6 Gray, 450. But the statements of an engineer, made some days after an injury by his engine, in regard to the occurrence, are not evidence against the company. *Robinson v. Fitchburg & Worcester Railroad Co.*, 7 Gray, 92. And declarations of the president of the company that he thought the company would pay plaintiff something, on plaintiff's application to the company for damages, and their vote to lay it on the table, are not evidence. *Ib.* But the fact that the consignee of goods made inquiry for them at the proper office, and could not obtain them after they should have arrived, is evidence of the loss. *Ingledeu v. Northern Railroad Co.*, 7 Gray, 86.

⁴ *Van Horn v. Kermit*, 4 E. D. Smith, 453. See also *Garvey v. Camden & Amboy Railroad Co.*, 1 Hilton, 280.

⁵ *Hart v. Rensselaer & Saratoga Railroad Co.*, 4 Seld. 37. The person selling the tickets and receiving the baggage is here treated as the agent of each company. This suit is against the last company on the route. And there was no evidence in the case where the loss occurred. *Straiton v. New York & New Haven Railroad Co.*, 2 E. D. Smith, 184. The first company is liable for the entire route, if the baggage is lost. *Cary v. Cleveland & Toledo Railroad Co.*, 29 Barb. 85. And in an English case it was held that the first company was the only one liable to be sued by the passenger, even where the loss occurred on the line of one of the other companies. *Mytton v. Midland Railway Co.*, 4 H. & N. 615. See also *Chicago & Rock Island Railroad Co. v. Fahey*, 52 Ill. 81.

(c) Collection of fare by the first the route, to the owner. *Baltimore & company for the entire distance re-* *Ohio Railroad Co. v. Campbell*, 36 ders it liable to deliver at the end of *Ohio St.* 647. Coupon ticket and

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* companies to keep agents in readiness to receive baggage, and if they allow the agents of other companies to receive their baggage at their stations, or their own agents to receive at the stations of other companies, they are bound by their acts.⁶

3. And where the company employ porters, at their stations, to convey passengers' baggage to or from the carriages in which the passengers come to or leave the stations of the company, their liability continues till it is delivered, and it makes no difference whether the baggage of coming passengers be placed in the same carriage with the passenger or in the baggage car.⁷ But if the

⁶ *Jordan v. Fall River Railroad Co.*, 5 Cush. 69.

⁷ *Richards v. London, Brighton, & South Coast Railway Co.*, 7 C. B. 839. In one case, *Butcher v. London & Southwestern Railway Co.*, 16 C. B. 13; s. c. 29 Eng. L. & Eq. 347, the plaintiff was a passenger from F. to W., bringing with him, as luggage, a small carpet-bag which was placed in the carriage he rode in. On arrival of the train at W., the plaintiff got out on the platform with the bag in his hand, and it was taken from him by a railway porter to be placed in one of the cabs which were standing in the station, and so lost. It was proved to be the practice of the company to have their porters assist in carrying the passengers' luggage to the cabs in the station. It was held, that there was evidence of the company having contracted to deliver the plaintiff's bag to the cab, and of their not having performed the contract, and that whether the plaintiff had accepted a delivery on the platform in lieu of a delivery to the cab, was a question of fact for the jury. The question of the responsibility of passenger carriers for the luggage of such passengers is very carefully considered in *Talley v. Great Western Railway Co.*, Law Rep. 6 C. P. 44, and held that passenger carriers are liable as common carriers for luggage, only when it is committed to their entire and exclusive control. See also *Greenfield Bank v. Marietta & Cincinnati Railroad Co.*, 20 Ohio St. 529.

It was held also that where luggage is placed under the care of the passenger in the carriage in which he rides, and for his own convenience personally, the obligation of the company is thereby modified, by the implied undertaking on the part of the passenger that he will use reasonable care against its loss or

check with the names of the several roads stamped on it, are not evidence that the companies are jointly engaged in carrying passengers. *Kessler v. New York Central & Hudson River Railroad Co.*, 61 N. Y. 538. But the company contracting to carry baggage and giving check through is bound to carry through. *Louisville & Nashville Railroad Co. v. Weaver*, 9 Lea Tenn.

218. The company is not bound to carry beyond its own road, in the absence of contract. *Mauritz v. New York, Lake Erie, & Western Railroad Co.*, 21 Am. & Eng. Railw. Cas. 286. But see *Montgomery & Eufaula Railroad Co. v. Culver*, 75 Ala. 587, where it is held that through tickets and checks do not render one company liable for the default of another.

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passenger choose to take the exclusive control of his own baggage, as a purse, or coat, cane, or umbrella, for instance, the company are not ordinarily liable.⁸ (d) But the liability having once attached, by a delivery to the company's servant, they remain liable until a full and unequivocal redelivery * to the owner, and ordinarily to the end of the route.⁹ A delivery upon a forged order is no excuse.¹⁰ A question sometimes arises in regard to the responsibility of passenger carriers for the baggage of passengers after its arrival at the point of destination, but before its delivery to the owner. We apprehend, that in analogy to other classes of common carriers, the responsibility must continue until the owner has had reasonable time and opportunity to come and take it away.¹¹ After that the responsibility as carrier ceases, and the carrier becomes a mere warehouseman, bound to exercise the same care that prudent men ordinarily do in keeping their

injury; and if the passenger is guilty of negligence, whereby loss or injury occurs, the company is not responsible; as where he leaves the carriage, and by not being able to find it again, completes the passage in another carriage, and his portmanteau is robbed by the passengers in the carriage where it was left. These views seem most unquestionable; and although, possibly, at variance with some of the American decisions, there can be no reasonable doubt of their soundness. But the responsibility of the carrier is in no sense lessened by the mere fact that the owner of the goods or baggage accompanies them and keeps a lookout over them, provided he does not interfere in regard to their transportation. *Hannibal Railroad Co. v. Swift*, 12 Wal. 262; *infra*, pl. 4, and notes. *Robinson v. Dunmore*, 2 B. & P. 416, CHAMBERLAIN, J.; *Cohen v. Frost*, 2 Duer, 335.

⁸ *Tower v. Utica & Schenectady Railroad Co.*, 7 Hill N. Y. 47. WILDER, J., in *Richards v. London, Brighton, & South Coast Railway Co.*, 7 C. B. 839. Carriers of passengers, as steamboat proprietors, are not liable for the loss of wearing apparel which passengers carry about their persons, and do not deliver to the officers of the boat as baggage for safe-keeping. *The Crystal Palace v. Vanderpool*, 16 B. Monr. 302, 808.

⁹ *Camden & Amboy Railroad Co. v. Belknap*, 21 Wend. 354.

¹⁰ *Powell v. Myers*, 26 Wend. 591; s. c. 2 Redf. Am. Railw. Cas. 133.

¹¹ *Infra*, § 175, pl. 8, 18. If baggage be not called for in a reasonable time the liability of the company as carrier ceases, and it is held only for ordinary care, as bailee for hire. *Van Horn v. Kermit*, 4 E. D. Smith, 453.

(d) So held in *Weeks v. New York, Lake Shore, & Michigan Southern New Haven, & Hartford Railroad Co.*, Railroad Co., 125 Mass. 54. And it 9 Hun, 669; s. c. 72 N. Y. 50. But makes no difference that it occurs in otherwise where it is lost through the a sleeping car of which the company negligence of the carrier. *Kinsley v.* is not the owner.

own goods of similar kind and value. In one case,¹² where a railway passenger, on arriving at his place of destination, took his baggage into his own exclusive control, but afterwards, for his own convenience, handed it to the baggage-master at the station, to be kept until sent for, it was held the company were only liable for gross negligence, the bailment being without reward. That would unquestionably be the rule, where one leaves baggage at a station, who was not a passenger and did not purpose to become one. Indeed, the company could hardly become responsible at all in such a case, since their agents have no authority to receive baggage on their account, except as incidental to passenger transportation. But, so long as the custody of the baggage is incident either to a past or prospective transportation of the passenger, the company must be regarded, at the least, as bailees for hire, the fare paid extending both to the transportation of the passenger and his baggage and the storage of the latter for a reasonable time afterwards, so as to meet any ordinary exigency of travel. But we should consider the case just referred to as standing upon the ground that the duty of transportation, with all its incidents, had become fully terminated, and, if so, it seems to us questionable how far the baggage-master had any authority on the part of the company to receive baggage merely to keep. It was clearly responsible only as a warehouseman. In * a somewhat recent case¹³ in Vermont, this question is learnedly and judiciously discussed by ALDIS, J., and the following propositions declared: A passenger arriving by cars at a railway station is justified in regarding the person who handles and takes charge of the baggage as the agent of the railway company; and notice to such person is notice to the company. It is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can call for and receive it; and it is the owner's duty to call for and remove it within a reasonable time. If he does not so call for and receive it, it is the company's duty to put it into their baggage-room and keep it for him, being liable only as warehouseman. And the reasonable time within which the owner must call for it is directly upon its arrival,

¹² *Minor v. Chicago & Northwestern Railroad Co.*, 19 Wis. 40.

¹³ *Quimit v. Henshaw*, 35 Vt. 605. See *infra*, § 172, note 12.

making reasonable allowance for delay caused by the crowded state of the depot at that time; and the lateness of the hour makes no difference, if the baggage be put upon the platform. Whether a bed, pillows, bolster, and bed-quilts, belonging to a poor man, who is moving with his family, carried along with him by a railway train, and packed in his trunk, or a box containing his clothing, are baggage or not, is a question to be decided by the jury, taking into consideration the peculiar circumstances, and the value, quality, and use of the articles. In *Van Toll v. South Eastern Railway Co.*,¹⁴ it was considered that a passenger, who left her bag in the cloak-room of a station of the company, on her arrival, taking a ticket for the same and paying 2d., there being printed on the ticket a notice that the company would not be responsible for articles so left, exceeding the value of £10, must be regarded as *prima facie* assenting to such restriction, and, therefore, that the company, in this instance, was not responsible beyond that amount for the loss of the contents of the bag by reason of delivering it to the wrong person. The obligation is the same in regard to baggage, where it is in excess of the weight allowed, and is paid for extra.¹⁵ When a passenger did not call for his trunk on arriving at the termination of his route, but left it overnight, without any arrangement, and it was *destroyed before morning by the burning of the station, it was held the company were not responsible.¹⁶

4. A passenger took passage upon one railway for B., at which point he intended to take passage upon another railway, whose terminus was about one hundred yards distant from the terminus of the first railway, there being an open, uncovered space between the two stations, and no connection in business between the companies, but a practice was conceded for the first company to carry luggage to the station of the other company. The porter obtained the plaintiff's portmanteau from the platform, where it had been deposited at the end of the first line, and placed it with other luggage on a truck, for the purpose of taking it across to the station of the other railway. The plaintiff testified, at the trial before

¹⁴ 12 C. B. N. S. 75; s. c. 8 Jur. N. S. 1218. See also *Curtis v. Avon, Gloucester, & Mount Morris Railroad Co.*, 49 Barb. 148.

¹⁵ *Glasco v. New York Central Railroad Co.*, 36 Barb. 557.

¹⁶ *Roth v. Buffalo & State Line Railroad Co.*, 34 N. Y. 548. But see *Burnell v. New York Central Railroad Co.*, 45 N. Y. 187.

the county court, that he saw the porter immediately after, with the truck, enter the station of the latter railway, and go to the place where luggage was put upon departing trains, but did not see his portmanteau, to recognize it, after it was first put upon the truck. He obtained his ticket, and asked the guard if his portmanteau was in the luggage van, and the guard told him to take his seat in the train, as it was about to move off, and to inquire for his portmanteau at the end of his route, which he did, but failed to find it. This suit was brought against the first company for not delivering the portmanteau either to the plaintiff or to the second railway, and the county court gave judgment against them upon the foregoing evidence. But it was held, on appeal to the Common Pleas, that the plaintiff must give preponderating evidence of the non-delivery ; and the mere fact of its non-arrival at its ultimate destination on the second railway was not sufficient, nor was the above evidence more consistent with the non-delivery than the delivery, and the judgment of the county court was reversed.¹⁷ But where an emigrant * passenger, on a voyage from Liverpool to New York, took the exclusive possession of his trunk, taking it into the steerage, placing it under his bed, and fastening it to his berth by ropes, and during the voyage it was stolen, it

¹⁷ The evidence all tended to show a delivery to the second company, and hence there was no testimony tending to prove the fact on which the case was made to turn in the court below. The decision, therefore, seems consistent with those cases where the court has refused to reverse a judgment depending in any degree on the determination of a disputed fact by the court rendering the judgment, where any testimony tends to support the judgment. *East Anglian Railway Co. v. Lythgoe*, 10 C. B. 726; s. c. 2 Eng. L. & Eq. 331; *Cawley v. Furnell*, 12 C. B. 291; s. c. 6 Eng. L. & Eq. 397; *Cuthbertson v. Parsons*, 12 C. B. 304; s. c. 10 Eng. L. & Eq. 521. In *Semlar v. Emigration Commissioners*, 1 Hilton, 244, S., an emigrant arriving in New York, was, under the rules of the commissioners, placed on board a barge with the baggage, for the purpose of being landed. The barge belonged to and was in the custody of certain railway companies, who had ticket offices in Castle Garden, the premises of the commissioners. Upon landing, the baggage was transferred to the wharf by the employés of the railway companies, in whose charge it was left for the purpose of being weighed and marked, while S. was required to enter Castle Garden in order to have his name registered, pursuant to the rules of the commissioners. During S.'s absence for this purpose his baggage was lost. It was held that the commissioners were not liable therefor. The baggage was not in their charge, nor in charge of any one of their employés. The remedy of S., if any, was against the persons in charge of the baggage, or their employers, the railway companies.

was held that the owners of the ship were not liable.¹⁸ In an English case¹⁹ * the question of the degree of exclusiveness of

¹⁸ *Cohen v. Frost*, 2 Duer, 335. In *Fisher v. Clisbee*, 12 Ill. 344, it was held, that passengers on board a ferry-boat, in taking care of their own property, after it has once got into the boat, may be regarded as agents of the ferryman, who is still liable for the property as a common carrier. The common carrier of passengers, by receiving the baggage of a traveller, becomes immediately responsible for its safe delivery at the place of destination. *Woods v. Devins*, 13 Ill. 746. But see *White v. Winnisimmet Co.*, 7 Cush. 155, where a person suffered damage, in crossing a ferry, by not taking proper care of his team, and the company was held not liable as common carriers, unless the owner of the team surrendered its custody to the ferryman, or his servants. In the case of *Wilsons v. Hamilton*, 4 Ohio St. 722, it was held, that a ferryman is a common carrier; but that if the owner of animals intrusted to his care knows of any special cause of peril, he is bound to inform; and if the owner, or his agent, take upon himself the care of the property, he is not to be regarded as the agent of the carrier in so doing, and the carrier is not liable for any injury resulting from the want of care in the owner or his agent. Nor is the owner precluded from recovering because he did not do all that skill or prudence could have suggested. See *Richards v. Fuqua*, 28 Miss. 792. In the case of *Powell v. Mills*, 37 Miss. 691, it was held, that ferrymen are subject to all the responsibilities of common carriers, and that after property is put on board their boats, it is *prima facie* in their charge, and they are responsible for it. And it makes no difference that the owner is present, unless he consents to assume the exclusive charge of the property. See *Slimmer v. Merry*, 23 Iowa, 90.

The passenger not accompanying his baggage, but going in an after train, will not excuse the carriers from their ordinary liability. *Logan v. Pontchartrain Railroad Co.*, 11 Rob. La. 24. But in *Wright v. Caldwell*, 3 Mich. 51, where the plaintiff, intending to take passage on defendants' steamboat, deposited his trunk on board, in the usual place, but without notifying any one employed on the boat, or making known his intention to take passage, and while he was temporarily absent the boat left, and the trunk could not afterwards be found, it was held no such delivery as to charge the defendant as a common carrier. And an offer to deliver freight or passengers' baggage, made at a proper time, though declined, discharges the carrier from his liability, as such; and if the freight or baggage still remains in his custody, he is only liable as a bailee for ordinary care. *Young v. Smith*, 3 Dana, 91. This was the case of a large amount of specie, carried, by consent of the officers of a steamboat, by a passenger, to be deposited in bank in the city of New Orleans. The court held it not requisite to deliver the specie in banking hours, unless some special contract or established usage of the port to the effect were shown, but that an offer to deliver any time in business hours, reasonable reference being had to its safety, was sufficient.

¹⁹ *Le Conteur v. London & Southwestern Railway Co.*, 12 Jur. n. s. 266; L. R. 1 Q. B. 54; s. c. 6 B. & S. 961.

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care which the passenger must take of his baggage in order to exonerate the carrier is considered. In this case the article was a chronometer, which the plaintiff, on a passage from Jersey to London, carried in his hand, tied up in a handkerchief, the rest of his luggage being stowed away by the carrier, apart from the plaintiff, in the usual mode. On the arrival of the plaintiff at the pier in Southampton, he left his luggage to be carried by the defendants in the usual mode to the railway station; but he carried the chronometer in his hand, tied up in the handkerchief, to the railway station, walking through certain streets a distance of half a mile. On arriving at the station the plaintiff went, "with the chronometer in his hand up to one of the railway carriages going to London, and gave the chronometer to a porter of the defendants, * and who then in the presence of the plaintiff placed it on the seat of the carriage. Both the porter and the plaintiff immediately after this left the platform together, the porter to attend to other duties, and the plaintiff to look after the rest of his luggage, which had not arrived from the custom-house. The plaintiff remained absent some ten or fifteen minutes; when he returned the chronometer was not to be found." The comments of Lord C. J. COCKBURN seem so precisely what the rule of law should be, in such cases, that we insert them at length: "When the case was first opened I imagined that the facts were such as to lead to the necessary inference that the plaintiff had taken possession of the chronometer in question, withdrawing it from the custody of the company, and himself taking charge of it. My first impression, however, appears to have arisen from a too rapid view of the circumstances. What really took place appears to be this,—that by desire of the plaintiff a porter of the company placed this article in one of the carriages, on a particular seat, which was to be reserved for the plaintiff. I am far from saying that no case can arise in which a passenger, having luggage which by the terms of the contract the company is bound to convey to the place of destination, can release the company from the care and custody of an article by taking it into his own immediate charge. But I think the circumstances should be very strong to show such an intention on the part of the passenger, and to relieve the company of their ordinary liability. And it is not because a part of the passenger's luggage which is to be conveyed with him is, by the mutual consent of the company and himself,

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placed with him in the carriage in which he travels, that the company are to be considered as released from their ordinary obligations. Nothing could be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have about him, in the carriage in which he travels, should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be thereby relieved from the obligation of safe carriage, it would follow that no one who has occasion to leave the carriage temporarily could do so consistently with the safety of his property. I cannot think, therefore, we ought to come to any conclusion which would have the effect of relieving the company as carriers from their obligation to carry safely, which obligation, for general convenience of the public, * ought to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances, such in fact as would lead irresistibly to the conclusion that the passenger takes such personal control and charge of his property as altogether to give up all hold upon the company, before we say that the company, as carriers, are relieved from their liability in case of loss. If therefore this case had depended on the question whether or not the company were liable upon the general issue, I should be of the opinion that the plaintiff was entitled to recover."

5. A servant travelling with his master on a railway may have an action in his own name against the company for the loss of his baggage, although the master took and paid for his ticket. The liability, in such case, is independent of contract, and the payment by the master will satisfy an averment of payment by the plaintiff.²⁰ It has been held, that the father might have an action for the loss of his son's baggage while he was employed upon his own business, and had been furnished by his father with a travelling trunk and clothes for the journey.²¹ And it is not important whether the passenger pay his own fare or it is paid by his friends.²²

²⁰ *Marshall v. York, Newcastle, & Berwick Railway Co.*, 11 C. B. 655; s. c. 7 Eng. L. & Eq. 519. In a declaration in case, against a common carrier, it is not necessary to allege the payment of, or agreement to pay, compensation. *Hall v. Cheney*, 86 N. H. 26.

²¹ *Grant v. Newton*, 1 E. D. Smith, 95.

²² *Van Horn v. Kermit*, 4 E. D. Smith, 453.

6. Common carriers of passengers sometimes assume to incur no responsibility for baggage unless delivered to their agents within a certain period before the departure of the passenger. But we apprehend that in such cases, if their servants at the proper place for receiving such baggage accept the same, to be carried with the passenger within any reasonable time, as the same day, or the night following, or the next morning,²³ (e) they must be regarded as having accepted it, as common carriers, and their responsibility as such attaches. Thus in Connecticut²⁴ the plaintiff took his trunk to a railway station at eleven o'clock A. M., and requested that it be checked for the next train to B., which was to leave at three P. M., but being informed that they did not give checks for baggage until within fifteen minutes of the departure of the train, he left his trunk with the agent, and at the proper time obtained a check and went himself by the same train. When he received his trunk at the end of the route, some money and clothing had been taken from it, but whether before or after its being checked did not appear. The court held it immaterial, since the responsibility of the company, as carriers, attached upon the first receipt of the trunk. And the giving the check was only in the nature of a receipt, and did not control the time of the responsibility of the company attaching.²⁴

7. But it is well settled that passenger carriers are not responsible as common carriers, for the absolute security of baggage

²³ *Camden & Amboy Railroad Co. v. Belknap*, 21 Wend. 354.

²⁴ *Hickox v. Naugatuck Railroad Co.*, 31 Conn. 281.

(e) A trunk delivered at the station in the evening to go with the passenger in the morning, and locked up in the baggage room according to custom, was held to have been accepted by the carrier. *Green v. Milwaukee & St. Paul Railway Co.*, 41 Iowa, 410. But see *Hoeger v. Chicago, Milwaukee, & St. Paul Railway Co.*, 21 Am. & Eng. Railw. Cas. 308, where it was held that the carrier was liable only for gross negligence. Whether baggage is to be deemed delivered to the carrier depends not on whether the passenger has put himself in such a position that he cannot withdraw it, but upon intention. *Ib.* Nor is notice that the baggage has been left necessary to bind the carrier, where the custom has sanctioned another course. *Green v. Milwaukee & St. Paul Railway Co.*, 38 Iowa, 100. Where a trunk was left with the company's freight agent overnight, the owner intending to take it to the passenger station to be checked for carriage in the morning, and the trunk was lost, it was held that the company was not liable as carrier. *Gilder v. Chicago & Northwestern Railway Co.*, 44 Iowa, 548.

which the passenger leaves in their custody for his own convenience after his arrival at his destination, or the termination of the particular route. The rule in this respect is the same as in regard to other goods carried by common carriers.²⁵ (f) The goods or baggage must be placed in a secure place in order to exonerate the carrier.²⁶

8. And the passenger carrier who stipulates with his passengers to be exempt from all responsibility for baggage, will not thereby be excused from responsibility for the wilful or careless misconduct of his servants in relation to it,²⁷ but only from his extraordinary responsibility as common carrier.

9. In some of the states, probably in most of them, there are statutory provisions for disposing of lost baggage, after a certain period of time, and under certain limitations; thus enabling the carriers to collect their charges, and also to relieve themselves from its too great accumulation. Under the statute in Pennsylvania it has been decided to be irregular to expose trunks for sale without knowing and declaring the contents, inasmuch as the owners being entitled to the residue of the avails of the sale are thereby defrauded. It was accordingly held in such a case that the owner might recover the value of the trunks sold in that mode.²⁸ (g)

²⁵ *Jones v. Norwich & New York Transportation Co.*, 50 Barb. 193; *infra*, § 175; *Rock Island & Pacific Railroad Co. v. Fairclough*, 52 Ill. 106; *Mote v. Chicago & Northwestern Railway Co.*, 27 Iowa, 22. But where the baggage fails of delivery to the owner at the end of the route through the fault of the carrier, as by being carried to another station, his responsibility as common carrier still continues. *Toledo & Wabash Railroad Co. v. Hammond*, 33 Ind. 379. It was held in this case that an opera-glass is a proper article of baggage.

²⁶ *Bartholomew v. St. Louis, Jacksonville, & Chicago Railroad Co.*, 53 Ill. 227.

²⁷ *Mobile & Ohio Railroad Co. v. Hopkins*, 41 Ala. 486; *infra*, § 177, pl. 9, § 192, pl. 4, note 12.

²⁸ *Schlessinger v. Adams Express Co.*, 1 Am. Law Record, 81. In the

(f) *Hogan v. Grand Trunk Railway Co.*, 2 Queb. Law, 142. And see *Patscheider v. Great Western Railway Co.*, Law Rep. 3 Exch. 153. Where baggage is not called for in a reasonable time after arrival at its destination, the liability of the carrier as carrier ceases and liability as warehouseman begins. *Matteson v. New York Central & Hudson River Railroad Co.*, 76 N. Y. 381. And liability as carrier will not be extended by the fact that the passenger, being taken ill, is given a stop-over check, and so does not arrive immediately. *Chicago, Rock Island, & Pacific Railroad Co. v. Boyce*, 78 Ill. 510.

(g) An order of court for sale un-

SECTION VI.

Limitations and Restrictions in regard to Baggage.

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| <ol style="list-style-type: none"> 1. 5. Company not liable for merchandise which passenger carries covertly. 2. And it makes no difference that the passenger has no proper baggage. 3. Jewelry, watches, old lace, linen cut into shirts, finger rings, surgical instruments, &c., considered as baggage. 4. Money for expenses, books for reading, clothing, spectacles, tools of trade, manuscripts, spring-horse, blankets, quilts, &c. 6. Carrier responsible for baggage, though passenger goes by another conveyance. | <ol style="list-style-type: none"> 7. Company cannot exonerate itself from all responsibility for baggage. 8. Definition of the term "trinkets," under the English statute. 9. In England company may exclude baggage from cheap trains, though in general passenger is entitled to a certain weight. 10. Stage proprietors, &c., responsible for baggage of their passengers. 11. But if employed by hotel keepers to transport their guests, both are responsible |
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§ 172. 1. Railways, as carriers of passengers, are not liable for the loss of a package of merchandise which a passenger brings upon the train packed as baggage, unless the company, having an opportunity to know the contents of the package, see fit to accept it as baggage.¹ (a) This question was considerably discussed in a

absence of statutory provisions for disposing of lost baggage, the carriers must resort to a court of equity. Story Eq. Jurisp., §§ 506, 1216-1220.

¹ Great Northern Railway Co. v. Shepherd, 8 Exch. 80; s. c. 9 Eng. L. & Eq. 477. In this case the court gravely declare that a husband and wife travelling together may take a hundred and twelve pounds baggage, the limit for one person, by act of parliament, being fifty-six pounds. Richards v. Westcott, 2 Bosw. 589; *infra*, pl. 5.

opened will not protect the carrier. Adams Express Co. v. Schlessinger, 75 Penn. St. 246. A tender of baggage more than a year after demand held not to relieve the company from liability for the loss. Lake Shore & Michigan Southern Railroad Co. v. Warren, 21 Am. & Eng. Railw. Cas. 302. The value of the baggage at its destination is the measure of damages in case of loss. 1b.

(a) Nor as carriers of baggage for merchandise in a trunk or valise of

which the carrier has no knowledge. Strouss v. Wabash, St. Louis, & Pacific Railway Co., 17 Fed. Rep. 209; Pennsylvania Railroad Co. v. Miller, 85 Ohio St. 541; Michigan Central Railroad Co. v. Carrow, 73 Ill. 348; Haines v. Chicago, St. Paul, Minneapolis, & Omaha Railway Co., 29 Minn. 100. This applies to sample trunks of commercial travellers. The company is not liable to an action in form *ex contractu*, nor to an action in any form except for gross negligence. Alling

recent case in New Hampshire,² where it was held that the carrier is not responsible for merchandise which a passenger takes along with him, unless a reward is given for the transportation, or it be of * a character which by usage or custom is to be regarded as travelling baggage. And the fact that other passengers, on other occasions, had taken along with them in the passenger cars similar bundles of merchandise without objection, has no legal tendency to prove that the bundle in question was transported at the risk of the carrier, unless it were shown that such bundles were knowingly carried as part of the baggage and paid for by the passenger ticket. But the carrier, although not liable as an insurer, will be liable, as an ordinary bailee without hire, for any loss or damage which is proved to have been caused by his own gross negligence or that of his servants.

2. So the word "baggage" was held not to include a trunk containing valuable merchandise and nothing else, although it did not appear the passenger had any other trunk with him,³ nor sam-

² *Smith v. Boston & Maine Railroad Co.*, 3 Am. Law Reg. n. s. 126; s. c. 44 N. H. 325. It seems that one of the conditions named in this case as the only ground of the liability of the carrier is not indispensable; namely, that he should receive pay *for the transportation by the passenger ticket*. That is a thing which never could be proved in either the affirmative or the negative. If the carrier knowing its contents accepts a bundle, or box, or trunk, containing merchandise, *as baggage*, we see no reason why he should not be responsible as a common carrier. If payment is made for a trunk of goods or merchandise, as extra baggage, the carrier is clearly responsible for its safe delivery. *Hannibal v. Swift*, 12 Wal. 262; *infra*, § 172, note 12.

³ *Pardee v. Drew*, 25 Wend. 459. It was held in *Collins v. Boston & Maine Railroad Co.*, 10 Cush. 506, that "thirty-eight pairs of new shoes, stock for sixty pairs boy's shoes, and two papers shoe nails," are not included under the term "baggage."

v. Boston & Albany Railroad Co., 126 Mass. 121. The carrier is not bound to inquire. He may assume that the trunk contains only personal baggage. *Haines v. Chicago, St. Paul, Minneapolis, & Omaha Railway Co.*, *supra*. As to liability for merchandise, see further *Blumantle v. Fitchburg Railroad Co.*, 127 Mass. 322. But where the company receives a trunk with notice that it contains merchandise and takes extra compensation for car-

riage, an agreement to carry may be inferred. *Sloman v. Great Western Railway Co.*, 67 N. Y. 208. And the company will be liable for a loss. *Perley v. New York Central & Hudson River Railroad Co.*, 65 N. Y. 374; *Strouss v. Wabash, St. Louis, & Pacific Railway Co.*, 17 Fed. Rep. 209. See *Millard v. Missouri, Kansas, & Texas Railroad Co.*, 86 N. Y. 441. See *Texas Railway Co. v. Capps*, 16 Am. & Eng. Railw. Cas. 118.

ples of merchandise, carried to enable the passenger to make bargains.⁴ This question was considered and determined in the House of Lords,⁵ where the law lords discussed the question at length.

* In this case the passenger took a through ticket, and had in his personal charge a case containing gold and silver watches, which an officer of the company on the journey requested the passenger to give him to be deposited in the luggage van, which was accordingly done. The property was subsequently stolen by one of the

⁴ *Hawkins v. Hoffman*, 6 Hill, 586; *Dibble v. Brown*, 12 Ga. 217. But where a passenger delivered a box containing embroideries to the agent for receiving baggage, and demanded a check for the place of his destination, and was told that the company "did not check such goods," but that they would go safely, it was held that the company was liable for the loss of the box, as common carriers, on the ground that there was no attempt to deceive them, or to have the parcel pass as baggage unless they consented, and if they consented to accept and carry it in a passenger train they were liable, and might charge freight the same as if they carried it on their freight trains. This seems to be a very reasonable view of the case. *Butler v. Hudson River Railroad Co.*, 3 E. D. Smith, 571. But there must be some proof that the person accepting the parcel was the proper agent for that purpose, or that it was placed in the company's cars. *Ib.*

⁵ *Belfast & Ballymena & Londonderry & Coleraine Railway Co. v. Keys*, 8 Jur. N. S. 367, 9 H. L. Cas. 556, on appeal from the Exchequer Chamber in Ireland; 11 Ir. Com. Law, 145; s. c. 8 Ir. Com. Law, 167. In one report of the case the reason assigned is, that the replication was bad, for not stating that the company had notice that the box contained merchandise, and this is the precise ground on which the opinion of the judges is placed by Chief Baron POLLOCK. But the Lord Chancellor in giving the leading opinion puts the case mainly on the ground that the plaintiff intended to mislead the company, and covertly carry merchandise as baggage. Lord WENSLEYDALE puts the case on the ground stated in the text. In *Cahill v. London & Northwestern Railway Co.*, 10 C. B. N. S. 154; s. c. 7 Jur. N. S. 1164; 8 Jur. N. S. 1063; Exchequer Chamber, 13 C. B. N. S. 818, it was held that a railway company is not liable for the loss of merchandise delivered to it by a passenger as his personal luggage, without notice that the luggage contains merchandise. In this case the Act of Parliament and the rules of the company allowed a certain weight of luggage with each passenger without additional charge; but the passenger was in fact ignorant of both. The court held that he was bound to know the Act of Parliament. The box in this case was marked in large letters, — "glass;" but the company was held not responsible. The judgment was reversed in the Exchequer Chamber, and the company held responsible, as if for so much luggage; for, having suffered the passenger to treat it as luggage, it could not after the loss set up that it was merchandise. The case of the *Belfast Railway Co. v. Keys*, *supra*, was there cited, and this seems to be the view taken in the Exchequer Chamber of the law of that case.

company's servants. By the rules of the company all merchandise not being personal luggage was to be paid for. An action was brought to recover the value of the case and watches. The defendant pleaded that the plaintiff was only entitled to carry personal baggage, whereas the case in question was merchandise. The plaintiff replied that the case manifestly contained merchandise, and was received by the defendants without objection, and without their demanding extra remuneration, and without inquiry as to the value of the case. The jury found that the case manifestly did contain merchandise, and that there was no improper concealment on the part of the plaintiff in respect of it, and that the defendants were guilty of gross negligence. On motion to enter up judgment for the defendant *non obstante veredicto*, on the ground that the replication was no valid answer to the special defence, the Exchequer Chamber, affirming the judgment of the Common Pleas, held the replication a good answer to the defence. The House of Lords reversed the judgment and held the defendants not liable. This was upon the ground that although by the original * contract the plaintiff was not to pay anything for his luggage, he was bound to pay for his merchandise, and the acceptance of the case by the servant of the company did not alter the contract made by the company. This seems to us to be carrying the law to the very extreme on behalf of the company; further than necessity or fair dealing towards the passenger would seem to justify. The act of the servant in the course of his employment should bind the company. The decision of the Irish courts appears more satisfactory than that of the House of Lords, but the latter is now the law of England. But the later cases cited in note 5 seem to qualify this very essentially.

3. In one case the carrier was held responsible for articles of jewelry, carried among baggage, which were a part of female dress, the plaintiff travelling with his family, such articles being treated without question as forming a part of the passenger's baggage.⁶ (b)

⁶ Brooke v. Pickwick, 4 Bing. 218; McGill v. Rowand, 3 Penn. St. 451. In Whitmore v. The Caroline, 20 Mo. 513, it was held not to be within the ordinary duty of a steamboat as a common carrier to transport specie, and

(b) Old family laces of the value of wealth travelling for pleasure. New ten thousand dollars held a proper part York Central & Hudson River Railroad Co. v. Fraloff, 100 U. S. 24.

[*49]

So a watch carried in one's trunk is proper baggage.⁷ (c) And so of linen cut into shirt bosoms.⁸ Finger-rings have also been regarded as wearing apparel.⁹ But a dozen silver teaspoons, or a Colt's pistol, or surgical instruments, except the passenger be connected with the profession, are not properly a portion of the travelling baggage.¹⁰ And title-deeds and documents, which an attorney is carrying with him to use on a trial, are not luggage; nor is a considerable amount of bank-notes, carried to meet the contingencies or exigencies of the case.¹¹ (d)

4. Railways, as carriers of passengers, are not liable for money, which passengers may carry as baggage, beyond a reasonable amount for travelling expenses.¹² The passenger is allowed * to

that the officers could not bind the proprietors by such an undertaking unless by proof of a usage, and that a passenger's baggage included specie only to the extent of his probable expenses. But see *Nevins v. Bay Steamboat Co.*, 4 Bosw. 225.

⁷ *Jones v. Voorhees*, 10 Ohio, 145; *Mississippi Central Railroad v. Kennedy*, 41 Miss. 671.

⁸ *Duffy v. Thompson*, 4 E. D. Smith, 178.

⁹ *McCormick v. Hudson River Railroad Co.*, 4 E. D. Smith, 181.

¹⁰ *Giles v. Fauntleroy*, 13 Md. 126. But surgical instruments are proper baggage for a surgeon in the army. *Hannibal Railroad Co. v. Swift*, 12 Wal. 262.

¹¹ *Phelps v. London & Northwestern Railway Co.*, 19 C. B. n. s. 321.

¹² *Orange County Bank v. Brown*, 9 Wend. 85; *Weed v. Saratoga & Schenectady Railroad Co.*, 19 Wend. 534; *Bell v. Drew*, 4 E. D. Smith, 59; *Duffy v. Thompson*, 4 E. D. Smith, 178. In the case of *Jordan v. Fall River Railroad Co.*, 5 Cush. 69, the rule, in regard to money carried by a passenger as part of his baggage, is thus laid down by FLETCHER, J.: "Money *bona fide* taken for travelling expenses and personal use, may properly be regarded as forming a part of the traveller's baggage." And this is, perhaps, as satisfactory and as definite a rule as the subject admits of. *Taylor v. Monnot*, 1 Abbott Pr. 325; *Merrill v. Grinnell*, 30 N. Y. 594.

In Tennessee it seems to have been considered, that money beyond expenses, or a watch, are not a proper part of one's baggage in travelling. *Bomar v. Maxwell*, 9 Humph. 621. And in the case of *Doyle v. Kiser*, 6

(c) *American Contract Co. v. Cross*, 8 Bush, 472. In this case it is said that whatever is a necessary appendage of a traveller may be regarded as baggage, and placed in a trunk for conveyance. to ply his trade may take tools in reasonable quantity as baggage. *Kansas City, Fort Scott, & Gulf Railroad Co. v. Morrison*, 23 Am & Eng. Railw. Cas. 481. But a feather-bed intended for use on a voyage is not baggage.

(d) A mechanic making a journey *Connelly v. Warren*, 106 Mass. 146.

take not only money sufficient to defray the ordinary expenses of the journey contemplated, but any reasonable sum in addition,

Porter, 242, where a passenger on a canal boat had \$4,000 in gold in his carpet-bag, which he did not name to the officers of the boat, and which was stolen during his passage, it was held the carriers were not liable therefor. PERKINS, J., enumerates as articles of ordinary baggage for which a carrier would be liable, "clothing, travelling-expense money, books for reading and amusement, a watch, ladies' jewelry for dressing." A gold watch and gold spectacles were held baggage in the case of *The H. M. Wright*, Newb. 494. And in *Davis v. Cayuga & Susquehanna Railroad Co.*, 10 How. Pr. 330, it was held, that a harness-maker's tools, valued at \$10, and a rifle, were to be regarded as properly forming a part of the passenger's baggage on a railway, and that the possession of the company's check was *prima facie* evidence of his having been a passenger, and that he had baggage checked on that occasion, the possession of the check being accompanied with proof of the custom of the company to put checks on all baggage where it was required, and to give duplicates to the passengers. See also *New Orleans Railroad Co. v. Moore*, 40 Miss. 39. And it was held that a railway company cannot be made responsible for watches and valuable merchandise as passenger's baggage, even where the extra weight is specially paid for. *Cincinnati & Chicago Air Line Railroad Co. v. Marcus*, 38 Ill. 219; *Hutchins v. Western Railroad Co.*, 25 Ga. 61. Carrier held responsible for manuscripts carried by a student returning to college, and important in his studies. *Hopkins v. Westcott*, 7 Am. Law Reg. n. s. 533. Under the English statutes passengers are allowed to carry, free of charge, a certain weight of "personal and ordinary luggage." It was held, that a railway company was justified in refusing to carry, as luggage, a "spring-horse," for a child to ride on, weighing seventy-eight pounds and measuring forty-four inches in length. *Hudston v. Midland Railway Co.*, Law Rep. 4 Q. B. 366. In the case of *Macrow v. Great Western Railway Co.*, Law Rep. 6 Q. B. 612, it is laid down, that whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with regard to the immediate necessity or the ultimate purpose of the journey, is to be considered as personal luggage. But where a passenger had given up his residence in Canada, and was taking with him in his trunk, for the use of his household when he should find a home in London, as personal luggage, six pairs of sheets, six blankets, and six quilts, and the trunk was lost on the railway between Liverpool and London, it was held that he could not recover for their loss. The case of *Quimit v. Henshaw*, 85 Vt. 605, was cited in argument; but the Lord Chief Justice did not seem to comprehend how such articles could fairly be brought within the definition of "personal or ordinary luggage." The restriction in the act of Congress (Sta. U. S. 1851, c. 43, § 2), upon the responsibility of masters of sea-going vessels for the loss of bank-bills, coin, jewelry, precious metals, and precious stones, shipped and laden without notice to them, and entry on the bill of lading of the true character and value of the same, does not apply to contracts for carrying passengers and their baggage. *Dunlap v. International*

for such contingencies as are not improbable.¹³ (e) But in one case it was held, without much reason, we think, that if the passenger carried necessary money for his journey in his trunk, the company were not liable for the loss.¹⁴ And other cases have expressed doubts in regard to the general responsibility of common carriers for bank-bills.¹⁵ And in another case,¹⁶ where the passenger had in his trunk sixty dollars for the purpose of purchasing clothing at the place of his destination, it was held the carriers were not liable as such for any additional damages on account of the loss of this money.

* 5. And where the plaintiff sent, by a passenger train, a quantity of merchandise, expecting to go himself in the same train, but did not, and the goods were lost without any gross negligence or any conversion by the carriers, it was held they were not liable.¹⁷

Steamboat Co., 98 Mass. 371. In such case the carrier is responsible, as in other cases of passenger carriers, for such amount of money as is requisite for the journey and ordinary contingencies. But it was here held that the carrier would not be responsible for money of one passenger in the valise of another passenger. And railway companies will not be held responsible for samples of merchandise committed to them by the agent of the owner as his personal baggage, except on proof of gross negligence. *Stimpson v. Connecticut River Railroad Co.*, 98 Mass. 83; *Mississippi Central Railroad Co. v. Kennedy*, 41 Miss. 671; *supra*, § 172, pl. 1, and notes. The act of Congress, March 3, 1851, exempting carriers of "goods and merchandise" by water from responsibility for losses by accidental fire occurring without their neglect extends to the baggage of passengers. *Chamberlain v. Western Transportation Co.*, 44 N. Y. 305.

¹³ *Johnson v. Stone*, 11 Humph. 419.

¹⁴ *Grant v. Newton*, 1 E. D. Smith, 95.

¹⁵ *Chicago & Aurora Railroad Co. v. Thompson*, 19 Ill. 578. In *Illinois Central Railroad Co. v. Copeland*, 24 Ill. 332, it is held that a reasonable amount of bank-bills may be carried in a trunk, and their value recovered as lost baggage.

¹⁶ *Hickox v. Naugatuck Railroad Co.*, 31 Conn. 281. It would seem that this amount of money for this purpose might well enough have been necessary or convenient personal baggage; but the court thought otherwise, and reversed the judgment of Mr. Justice McCurdy in the court below on this ground alone.

¹⁷ *Collins v. Boston & Maine Railroad Co.*, 10 Cush. 506. But it has been held, that where by the printed rules of a railway company the baggage-masters were prohibited from receiving merchandise on passenger trains, and one

(e) *Fairfax v. New York Central & Hudson River Railroad Co.*, 73 N. Y. 167.

6. But where a passenger in a vessel had his baggage put on board another vessel because it did not arrive by cars in time for that on which he had taken passage, it was held that the owner of the vessel was not to be regarded as a gratuitous bailee, but as a common carrier, being entitled to demand pay for the transportation under the circumstances, either in advance or at the end of the voyage. (*f*) It is here said, that in the common case, where the baggage accompanies the passenger, his fare includes pay for his baggage, but in any case, where a passenger orders his baggage sent by a carrier independent of any one to accompany it, if the carrier consents to accept the charge he may demand compensation, as before stated, and is liable as in ordinary cases.¹⁸

7. Companies cannot make such restrictions in regard to the kind of baggage and the mode of transportation as to virtually exonerate themselves from just responsibility.¹⁹ (*g*) But in any

nevertheless took a carpet, the passenger not knowing of the rule, the company was liable for the loss of the carpet. *Minter v. Pacific Railroad Co.*, 41 Mo. 503. And where checks for baggage worth \$100 were delivered to a carrier, and a receipt taken on which was printed "Liability limited to \$100 except by special agreement," there being no proof of assent to these terms except by accepting the receipt, and the baggage was lost by the carrier's negligence, he was held responsible for the whole value on the ground that the proof of assent to the limitation was not satisfactory, and that if it were it would not excuse the carrier for negligence but only from liability as insurer. *Prentice v. Decker*, 49 Barb. 21; *Limburger v. Westcott*, 49 Barb. 283. Carrier not responsible for silver-ware carried in the trunk of a passenger as baggage. *Bell v. Drew*, 4 E. D. Smith, 59.

¹⁸ *The Elvira Harbeck*, 2 Blatchf. C. C. 336.

¹⁹ *Munster v. Southeastern Railway Co.*, 4 C. B. n. s. 676. Under the English Carriers' Act, the carrier cannot restrict his responsibility of common carrier except by a contract in writing signed by the other party; and the restriction must be such as the court deem reasonable. But this rule will not apply to transportation beyond the limits of the carrier's line and out of the kingdom. *Zunz v. Southeastern Railway Co.*, Law Rep. 4 Q. B. 539.

(*f*) Where the baggage consists of articles that have been used by husband and wife, the husband is not precluded from a recovery for the loss of such as belong particularly to himself by going personally on another train. He is represented by his wife. *Curtis v. Delaware, Lackawanna, & Western Railroad Co.*, 74 N. Y. 116.

And for such as belong to the wife in the absence of gift to her, the husband is the proper party to sue. *Ib.* See *Hawkins v. Providence & Worcester Railroad Co.*, 119 Mass. 596.

(*g*) They may make such regulations in that behalf as are not unreasonable or inconsistent with statute or their duties to the public; and if

case, where the company are justified in refusing to carry a package, they may lawfully take it, if left on their premises, to the lost property office, and charge their regular fee upon redelivery.¹⁹

8. It is often made a question under the English Carriers' Act what is embraced under the word "trinkets." They must be * either things of mere ornament, or, where that element predominates, such as bracelets, shirt-pins, rings, portmonnaies.²⁰ Common carriers of passengers may restrict their common-law responsibility as insurers of the delivery of baggage.²¹

9. In England, where the act of parliament allows every passenger to carry a certain weight of luggage, it is held not to preclude the companies from excluding all luggage from cheap excursion trains, and where a passenger on such trains puts his baggage in the van, the company may demand reasonable compensation for its transportation.²² But a railway company is

¹⁹ *Bernstein v. Baxendale*, 6 C. B. N. S. 251; 5 Jur. N. S. 1056. So silk watch-guards are "silk in a manufactured state;" and smelling-bottles come within the term "glass," used in the act. *Ib.*

²¹ *Peninsular & Oriental Steam Navigation Co. v. Shand*, 3 Moore P. C. C. N. S. 272; s. c. 11 Jur. N. S. 771.

²² *Rumsey v. Northeastern Railway Co.*, 14 C. B. N. S. 641; s. c. 10 Jur. N. S. 208. And a passenger who accepts a ticket for an excursion train, referring him to a bill on which it is announced that luggage in such trains is at the owner's risk, is not entitled to recover of the company for loss of such

brought to the knowledge of the passenger they will bind him. *New York Central & Hudson River Railroad Co. v. Fraloff*, 100 U. S. 24. But any artifice to deceive the carrier will relieve him. *Ib.* A limitation as to the sum for which the company shall be liable is not effected by mere notice not brought home to the passenger and assented to. *Parker v. South Eastern Railway Co.*, Law Rep. 1 C. P. 618; s. c. Law Rep. 2 C. P. 416. But see *Harris v. Great Western Railway Co.*, Law Rep. 1 Q. B. 515. Or, as some of the cases hold, words on a ticket or a check will not bind the passenger unless he agrees thereto. *Madan v. Sherard*, 73 N. Y.

329; *Baltimore & Ohio Railroad Co. v. Campbell*, 36 Ohio St. 647. And see *Cohen v. Southeastern Railway Co.*, Law Rep. 1 Exch. 217, which holds that the contract must be signed by the passenger. In *Rawson v. Pennsylvania Railroad Co.*, 48 N. Y. 212, it was held that a notice printed on the face of the ticket, not brought to the knowledge of the passenger when the baggage was left for carriage, would not bind him; and in *Mauritz v. New York, Lake Erie, & Western Railroad Co.*, 21 Am. & Eng. Railw. Cas. 286, it was held not to bind a passenger who could not read, the condition not having been explained to him.

liable for a passenger's luggage, although carried in the carriage in which he himself is travelling.²³

10. Stage proprietors and omnibus drivers who assume to carry baggage for all who apply, from the railway stations about the towns, are unquestionably responsible as common carriers, and it does not affect the responsibility of such carriers, where they enter the names of passengers on way-bills, but do not enter the baggage.²⁴

11. But where a hotel-keeper in the vicinity of a railway station gives public notice that he will furnish a free conveyance from the station to his house, for guests, and for this purpose employs the proprietors of certain carriages, it was held that a traveller to whom this arrangement was known, and who employed one of these carriages to carry himself and baggage to this hotel, the baggage being lost by the negligence of the owner of the carriage or his agents, might maintain *assumpsit* or case for the same against the proprietor of the house.²⁵

*SECTION VII.

Person sustaining Loss, how far a Witness.

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| 1. At common law such person could not be a witness.
2. Admitted in some of the American courts on the ground of necessity.
3-5. Decisions in different states. | 6. Agents and servants of the company admitted to testify from necessity.
7. Party's testimony being excluded, the jury are allowed to apply a reasonable presumption. |
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§ 173. 1. The question how far the party claiming to have sustained loss by carriers may be himself a witness in the action, since the general disposition manifested, both in England and this country, to admit the testimony of the parties generally, is

baggage, although in fact ignorant of the statement in the bill. And it will make no difference in the responsibility of the company, that the company does not allow the passenger to retain his baggage under his own personal control. *Stewart v. London & Northwestern Railway Co.*, 3 H. & C. 135.

²³ *Le Conteur v. London & Southwestern Railway Co.*, Law Rep. 1 Q. B. 54;

13 Law T. N. s. 325; *supra*, § 171, note 7.

²⁴ *Peixotti v. McLaughlin*, 1 Strob. 468.

²⁵ *Dickinson v. Winchester*, 4 Cush. 115.

becoming of much less importance. (a) We will, nevertheless, refer briefly to the decisions upon this subject. We are not aware that any such exception was ever attempted to be made by the English courts. The general rules of evidence seemed altogether adequate to the exigency. If the carrier had lost the package or parcel, it was by his fault that the difficulty of ascertaining its contents had arisen, and the jury should, on that account, solve all doubts against him.¹

2. But in many of the American courts it has been regarded as one of those exceptions, founded upon necessity, like the loss of a written instrument, where it became indispensable to admit the testimony of the party, the facts being, in presumption of law, confined exclusively to his knowledge. And some of the English books speak of the same rule being applicable to the proof of the contents of a box delivered to, and lost by, a common carrier.² But it does not seem to have been there followed, in recent times, unless the case possessed other features beyond the mere loss of the box, as fraud, or the intentional withholding of evidence. And some of the American cases, where the testimony of the party was admitted, as to the contents of parcels delivered to carriers and lost by them, have been of the latter character.³ The American * courts have evidently admitted the exception with

¹ Greenl. Ev. § 37; *Armory v. Delamirie*, 1 Stra. 505. But the decisions are not uniform on this subject, especially where there is no intentional withholding of evidence. In such case it has been held the presumption is against the plaintiff. *Clunnes v. Pezzey*, 1 Camp. 8; *Dill v. Railroad Co.*, 7 Rich. 158, 163; 6 Rich. 198.

² 12 Vin. Ab. 24, pl. 34.

* *Hermann v. Drinkwater*, 1 Greenl. 27. This is the earliest case we recollect to have seen of this kind in the American Reports, and was one of fraud, where a shipmaster, having received a trunk of goods on board his vessel for carriage, broke it open and abstracted the goods. This case is virtually reaffirmed in *Gilmore v. Bowdoin*, 3 Fairf. 412, and the exception rests here altogether on the ground of necessity. See *Garvey v. Camden & Amboy Railroad Co.*, 1 Hilton, 280. And the same rule obtains in Illinois. *Parmelee v. McNulty*, 19 Ill. 556; s. c. 20 Ill. 392; *Davis v. Railway Co.*, 22 Ill. 278.

(a) And is now of less importance than it was when the first edition of this book was published, as the testimony of parties is now almost everywhere admissible, the interest of the party being allowed only its natural effect upon the credibility of such testimony, — an effect often little better for the party than exclusion under the ancient rule.

reluctance, and have manifested a constant disposition to restrain it within the narrowest limits.

8. Hence in Pennsylvania they hold that it only extends to such articles of wearing-apparel as it may ordinarily be presumed the party himself, or his wife, will have packed, and consequently be the only witnesses able to give testimony in regard to them.⁴

4. And in Massachusetts the courts have altogether repudiated the rule of the admissibility of the party as a witness, in this class of cases, on the ground of necessity.⁵

5. But in Ohio the courts seem to have adopted the same view of the subject as in Maine and Pennsylvania.⁶

6. In some cases it has been held that the servants of the company, who have charge of things carried on their trains, are *ex necessitate*, competent witnesses, to prove the delivery thereof to the owner, in an action for non-delivery, although they thereby *exonerate themselves from blame and liability in a future action.⁷

7. The authorities upon this general subject are not uniform. And where the courts refuse to admit the party to testify to the contents of trunks, &c., lost by common carriers, it becomes mat-

⁴ Clark v. Spence, 10 Watts, 335. See also David v. Moore, 2 Watts & S. 230; Whitesell v. Crane, 8 Watts & S. 369; McGill v. Rowand, 3 Penn. St. 451. See also County v. Leidy, 10 Penn. St. 45; Pudur v. Boston & Maine Railroad Co., 26 Me. 458; Dibble v. Brown, 12 Ga. 217.

⁵ Snow v. Eastern Railroad Co., 12 Met. 44. But by Maine Stat. of 1851, c. 147, § 5, it is provided that the party may in such cases swear to the correctness of a descriptive list of the articles contained in passenger's baggage. And by Gen. St. c. 131, § 14, parties are witnesses generally. So that this question becomes of comparatively small importance here; and the same is now true in England and in most of the states. The courts have recognized the right of the party to testify to the contents of a parcel of which he is robbed. Proceedings against the Hundred, Bull. N. P. 187; East India Co. v. Evans, 1 Vern. 305. The same rule is adopted in New Jersey as in Massachusetts. Graby v. Camden & Amboy Railroad Co., 19 Law Rep. 684. So also in Michigan. Wright v. Caldwell, 8 Mich. 51. See also Illinois Central Railroad Co. v. Copeland, 24 Ill. 332.

⁶ The Mad River & Lake Erie Railroad Co. v. Fulton, 20 Ohio, 318. In this case it was held that from necessity the owner of baggage and his wife are competent witnesses to prove the contents of a trunk lost by the plaintiffs, and its value, consisting of the ordinary baggage of a traveller. See also Johnson v. Stone, 11 Humph. 419; Oppenheimer v. Edney, 9 Humph. 385.

⁷ Draper v. Worcester & Norwich Railroad Co., 11 Met. 505; Moses v. Boston & Maine Railroad Co., 4 Fost. N. H. 71, 80.

ter of necessity to allow the jury to give damages proportioned to the value of the articles, which it may fairly be presumed the trunk, &c., might and did contain.⁸ By the construction of the statute in Kentucky,⁹ the members of railway corporations are made witnesses in suits where the company is a party.

SECTION VIII.

When the Carrier's Responsibility begins.

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| <ol style="list-style-type: none"> 1. Carrier's responsibility begins in general on delivery of the goods. 2. Delivery at the usual place of receiving goods, with notice, sufficient. 3. Carrier liable as carrier from receipt of goods, where goods are delivered to be carried immediately. 4. Company operating part of a continuous line not responsible till it receives the goods. | <ol style="list-style-type: none"> 5. Acceptance by agent sufficient, without payment of freight. 6. Question of fact, whether carrier took charge of the goods. 7. Sufficient to charge company, that goods are put in charge of its servants. 8. Whether goods are left for immediate transportation, often matter of inference. |
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§ 174. 1. There is no difficulty in defining in general terms when the liability of the carrier begins. It begins when the goods are delivered to him, or his proper servant, authorized to receive them, for carriage. (a)

2. But many questions have arisen as to what amounted to a delivery, so as to put the goods into the constructive custody and risk of the carrier. If the goods are delivered for carriage at the usual place of receiving similar articles, and notice given to the proper servant of the company, there is little chance for any question * upon this subject, in regard to the responsibility of the com-

⁸ Dill v. Railroad Co., 7 Rich. 158; Stadhecker v. Combs, 9 Rich. 193.

⁹ Civil Code, § 675; Covington & Lexington Railroad Co. v. Ingles, 15 B. Monr. 637. See also as bearing on the general question, Sugg v. Memphis & St. Louis Packet Co., 40 Mo. 442; Moran v. Portland Steam Packet Co., 35 Me. 55.

(a) To render the carrier liable as there must be privity of contract, express or implied, and a right to compensation. Central Railroad & Banking Co. v. Lampley, 76 Ala. 357. There must be, in addition to a delivery actual or constructive, a notice to the carrier of an intention thereby to place the goods in his care. O'Bannon v. Southern Express Co., 51 Ala. 481.

pany to the end of their route. (b) For a carrier is bound to keep the goods safely after delivery to him for carriage, as well as to carry safely.¹ Questions have often arisen upon this subject, where the person to whom the delivery was made acted as a forwarding merchant or warehouse-keeper, or in some other capacity, as well as that of carrier, whether the delivery and acceptance of the goods were in the capacity of carrier or agent for the carrier, or in the other capacity which the person sustained.

3. But in the case of railways such questions seldom arise at the beginning of the transit, unless where the goods are delivered to be kept in warehouse until further orders, in which case the liability of carrier will not attach until the goods are ordered to be carried. But when this order is given, and also when the goods are left in the first instance to be carried presently, the responsibility of the carrier attaches at once.² (c)

¹ LEE, C. J., in *Dale v. Hall*, 1 Wils. 281; *Merriam v. Hartford & New Haven Railroad Co.*, 20 Conn. 354; s. c. 2 Redf. Am. Railw. Cas. 142. In the last-named case it was decided, that a delivery on a wharf where steamboat carriers were accustomed to receive freight, and which they held as private property, fenced off from the street for that purpose, and where they usually had some one to take charge of freight, was a constructive delivery to such carriers, although no notice to the freight-master was proved, it being shown to be the custom of the company to regard all freight delivered on that dock as received for transportation. The goods in this case were given in charge of one of the steamboat hands who seemed to have charge of the dock, and who said, on being informed of the delivery, "All right." And the company will be held responsible for all damages accruing after delivery, although not allowed to complete the transportation by reason of the interference of the insurers on the ground that the goods are not in fit condition for transportation; and the insurers may recover such damages, if it operate to their loss. *Rogers v. West*, 9 Ind. 400. See also *Lakeman v. Grinnell*, 5 Bosw. 625. See *Grovenor v. New York Central Railroad Co.*, 39 N. Y. 34; *Hannibal Railroad Co. v. Swift*, 12 Wal. 262.

² *Spade v. Hudson River Railroad Co.*, 16 Barb. 383. In this case the plaintiff took part of the goods away, after they were put into the custody of company's servants, without the company's knowledge, and it was held, that the company was simply a depository and not liable as a carrier; and that the plaintiff could not call on a jury to conjecture how many of the goods were lost, but must show first how many he took away, and how many he left. See opinion of COLT, J., in *Barron v. Eldridge*, 100 Mass. 455.

(b) Delivery at a place where it is binding. *Montgomery & Eufaula* usual to receive goods, e. g., of cotton *Railway Co. v. Kolb*, 73 Ala. 396.
in a street along by the platform, is (c) As to goods delivered for im-

4. In a case where a railway formed part of a continuous line of transportation, and had an agent at Charleston to look after goods arriving at that point for the interior along the line of their railway, and a package of goods, so addressed as to have gone over such railway, was lost after its arrival at C., it was held, * "that until the goods are in possession of the railway, they are not liable as common carriers." ³

5. It has been held sufficient to charge the carrier, that the delivery was at a place and to a person where and with whom parcels were accustomed to be left for this carrier; and it is immaterial whether any payment of freight is made to this person. ⁴ (d)

³ *Maybin v. South Carolina Railroad Co.*, 8 Rich. 240. In *Barter v. Wheeler*, 49 N. H. 9, where a transportation company on a continuous line gave notice to the consignee that it had received the goods and would forward them in due time, and after the goods had been destroyed by fire, and the consignee had made application to have the loss adjusted, gave no intimation until after suit brought against by the consignee, that the goods were destroyed in the hands of the previous carrier, it was held that such company was estopped to deny that the goods had come to its possession. It was also held that the transportation company was a common carrier in respect of the goods, from the time it notified the consignee of their having come to their possession; that it could not claim to hold them as a warehouseman, unless by some direction or agreement of the consignee it was authorized to store them for him; that the counting of the packages from the next preceding carrier on the line was not an indispensable prerequisite to the transfer of the possession. In the case of *Bonney v. The Huntress*, 4 Law J. 38; s. c. *nom. The Huntress*, Davies D. C. 83, for a box of goods shipped at Boston, to be delivered at Portland, it was held to be the duty of the owners of goods to have them properly marked, and to present them to the carrier or his servants, to have them entered on the books. See *Krender v. Woolcott*, 1 Hilton, 223.

⁴ *Burrell v. North*, 2 Car. & K. 680. ERLE, J., said, "If the defendant allow these persons to receive parcels, to be conveyed by him, as a carrier, this is quite enough."

mediate shipment the company is liable as carrier; but as to those left subject to directions, as gratuitous bailee merely. *Little Rock & Fort Smith Railroad Co. v. Hunter*, 42 Ark. 200. Where goods are delivered in instalments without express directions to transport immediately, it depends on the nature of the goods and the course of the business whether they are to be shipped as delivered, or

shipped all at once on the final delivery. In the former case the carrier's liability attaches with each delivery, in the latter on final delivery. *Watts v. Boston & Lowell Railroad Co.*, 106 Mass. 466.

(d) The placing of cotton on the car of the carrier or near his warehouse is not a delivery, in the absence of custom to that effect, or unless notice is given. *Houston & Texas*

6. But an acceptance by the carrier at an unusual place, will be sufficient to charge him. It seems always sufficient that the goods are "put into the charge of the carrier."⁵ And what is a sufficient putting in charge of the carrier, must always be a question of fact, to be judged of by the jury with reference to all the circumstances of the case, and the usual course of business in similar transactions, at the same place and with the same company. And it will be found ordinarily to resolve itself into this inquiry, whether the owner of the goods did all to effect a secure delivery to the carrier which it was reasonable to expect a prudent man to have done under the circumstances.

7. But the cases all agree that it is always sufficient if the proper servants of the company accept the goods to carry, whether the acceptance is in writing or not, or whether any bill or any entry in the books of the company is made.⁶ And the point of such acceptance by the carrier is ordinarily when the goods are put into the charge of those who are in law the servants of the carrier.⁷ It has been considered that if the owner assume the care and custody of the thing himself, instead of trusting it to the carrier, * the carrier is not liable for the loss.⁸ But the fact that the owner accompanies the goods to keep an eye upon them, if he do not exclude the care of the carrier's servants, will not excuse the carrier.⁹ But it has been held, that the delivery of the goods must be made known to the servants of the company or car-

⁵ Lord ELLENBOROUGH, in *Boehm v. Combe*, 2 M. & S. 172.

⁶ *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16; *Phillips v. Earle*, 8 Pick. 182; *Pickford v. Grand Junction Railway Co.*, 12 M. & W. 766.

⁷ *Boys v. Pink*, 8 C. & P. 361; *Davey v. Mason*, 1 Car. & M. 45. But the crew of a steamboat are not the agents of the boat, for the purpose of receiving freight, whereby to charge the owner as a common carrier. *Trowbridge v. Chapin*, 23 Conn. 595. See also *Ford v. Mitchell*, 21 Ind. 54.

⁸ *Tower v. Utica & Schenectady Railroad Co.*, 7 Hill N. Y., 47. This is the case of a passenger who left his overcoat on the seat in the car, and forgot to take it. *Miles v. Cattle*, 6 Bing. 743, is to the same effect. *Infra*, § 182. But a passenger carrier is not liable for what is not ordinary baggage. *Orange County Bank v. Brown*, 9 Wend. 85; *East India Co. v. Pullen*, 2 Stra. 690; *supra*, §§ 171, 172.

⁹ *Robinson v. Dunmore*, 2 B. & P. 416.

Central Railway Co. v. Hodde, 42 delivery. *Mobile & Girard Railroad Tex.* 467. That freight was paid is *Co. v. Williams*, 52 Ala. 278. not conclusive upon the question of

riers. This would seem indispensable ordinarily, to constitute carefulness and good faith on the part of the owner.¹⁰

* 8. Where a railway have a warehouse, at which they receive goods for transportation, as common carriers, and goods are delivered there with instructions to forward presently, the company are liable as common carriers, from the delivery of the goods. But if they are kept back by direction of the owner, the company are only responsible as depositaries.¹¹ Instructions to forward forthwith may be inferred from the course of business, in the absence of express proof.¹¹ And where the owner gave instructions to forward immediately, he will not be bound by counter instructions given by the cartman without his authority.¹¹

¹⁰ *Selway v. Holloway*, 1 *Ld. Raym.* 46; *Packard v. Getman*, 6 *Cow.* 757. In *Illinois Central Railroad Co. v. Smyser*, 38 *Ill.* 354, warehousemen having cotton to send by rail applied to the company, who ran a car on a side-track to the warehouse. The cotton was loaded on the car, and the agents of the company notified. It was the custom of the company, on receiving such notice, to have the bales counted and give a bill of lading, excepting losses by fire, as the other party knew, and then to send an engine to remove the cars. Before these last steps had been taken, the cotton was burned. It was held, that the delivery was complete, and as the bill of lading had not been made and accepted, the company could not claim any exemption from common-law responsibility. But it is fair to say, that the decision would meet the highest sense of justice more fully, if the delivery had been held only to devolve the responsibility which the company was expected to assume. But a delivery to the mate of a vessel by which goods are to be carried, is sufficient to charge the owner as carrier, when that is the custom of the wharf, and the wharfinger's responsibility terminates thereupon. *Cobban v. Downe*, 5 *Esp.* 41. And where a heavy article was carried by a truckman to the depot of a railway company, for transportation, and accepted and taken charge of for that purpose, and afterwards injured while being loaded on the cars, in part through the carelessness of the truckman, it was held, that the company was responsible, its responsibility having attached when its servants took charge of the goods. *Merritt v. Old Colony & Newport Railroad Co.*, 11 *Allen*, 80; *HOAR, J.*, in *Gass v. New York, Providence, & Boston Railroad Co.*, 99 *Mass.* 220, 227. And where goods had been accepted by the master of a ship in pursuance of the contract of affreightment, and were destroyed by the bursting of a boiler of the ship, while alongside in the lighter, it was held, that the owner might recover for the loss, and that he had a lien on the ship. *The Edwin*, 1 *Sprague*, 477. See also *The Freeman v. Buckingham*, 18 *How.* 182, as to the right of the master to bind the ship, in admiralty, by his conduct or contracts. After the carrier has receipted for the goods, they are as much at his risk as if they were aboard the vessel. *Greenwood v. Cooper*, 10 *La. An.* 776.

¹¹ *Moses v. Boston & Maine Railroad Co.*, 32 *N. H.* 71; *s. c.* 2 *Redf. Am. Railw. Cas.* 165. And if the defendants are both warehousemen and carriers,

and receive goods with instructions to forward immediately, they are liable as carriers. *Clarke v. Needles*, 25 Penn. St. 338; *Blossom v. Griffin*, 3 Kernan, 569. See also *Stewart v. Bremer*, 63 Penn. St. 268. But where they receive them as wharfingers, or warehousemen, or forwarding merchants, and not as carriers, the bailors are only liable for ordinary neglect. *Platt v. Hibbard*, 7 Cow. 497. See *Michigan Southern & Northern Indiana Railroad Co. v. Shurtz*, 7 Mich. 515. And where the owner, after making delivery to the carrier, requests that the goods be not forwarded until he hears from the consignee, and in the mean time the goods are burned by fire communicated from an engine of the company, it was held, that the direction relieved the company from the responsibility of carriers, and left it liable only for negligence as warehousemen. *St. Louis, Alton, & Terre Haute Railroad Co. v. Montgomery*, 39 Ill. 335. But goods kept in warehouse, either at the beginning or in the course of the transportation, for the convenience of the carrier, will be regarded as in the custody of the carrier, as such, and he will be held responsible accordingly. *Lawrence v. Winona & St. Peter Railroad Co.*, 15 Minn. 390.

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*SECTION IX.

Termination of Carrier's Responsibility.

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| <ol style="list-style-type: none"> 1. Responsibility of carrier of parcels for delivery at place of business, &c. a. (a) What will excuse delivery. Taking on legal process, &c. 2. Company not bound to make delivery of ordinary freight. 3. Duty as to delivery, affected by facts and course of business. 4. Carrier by rail ordinarily not bound to deliver goods, or give notice of arrival. a. 4, (f) Delivery of grain at elevators. 5. Delivery, in carriage by water. Rule different. 6. Carrier bound, as carrier, only to keep goods reasonable time after arrival. But cases divided. 7. Consignee must have reasonable opportunity to examine and remove goods. 8. After that, carrier liable only as an ordinary bailee for hire. 9. Goods arrive out of time, consignee must have time to remove, after knowledge of arrival. 10. So, if company's agent misinform the consignee, as to whether goods have arrived. 11. Carrier excused when consignee assumes control of goods. 12. Effect of warehousing at intermediate points in route. 13. If succeeding carrier has place for receiving goods, responsibility of preceding carrier ceases on delivery there. 14. Warehousemen at intermediate stations who are also carriers, generally responsible as carriers, on receipt of goods. 15. Goods addressed to agent of carrier at destination. Agent not consignee for purpose of delivery. | <ol style="list-style-type: none"> 16, 25, 30. Consignee refusing goods, duty of carriers that of involuntary bailee. 17, 18. Bound to keep goods a reasonable time or until they can be removed with diligence. 19. May deposit goods in his own or other warehouse. 20. Carrier by water unable to find the consignee, may exonerate himself by delivery to a responsible warehouseman. 21. Whether the carrier is discharged on arrival of the goods, where, it being Sunday, no delivery can lawfully be made until Monday, <i>quære</i>. 22. Carrier's responsibility ends when the warehouseman's crane is attached to hoist the goods. 23. Unlawful seizure or invalid claim of lien no excuse to the carrier for non-delivery. 24. Carriage by water, delivery must be according to the custom of trade and the usages of the port and in regular business hours. 26. Reasonable arrangement with consignee binding. 27. Carriage by water, in general there must be delivery at the wharf and notice or safe storage. 28. Carrier cannot charge for carrying to and from depot, unless such carriage is requested. 29. English statute forbids discrimination among customers. 31. Owner may alter destination of goods <i>in transitu</i>. 32. Goods at risk of carrier until time fixed for removal. |
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§ 175. 1. Where, by the course of a carrier's business, he is accustomed to deliver goods and parcels by means of porters or
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servants at the dwellings or places of business of the consignees, as was formerly the case, to a great extent, in England, and as is now done by express companies in this country, the carrier's responsibility * continues until an actual delivery to the consignee, or at his dwelling or place of business.¹ So, too, if the carrier deliver a parcel to a wrong person, without fault on the part of the owner, he is liable, as for a conversion.² (a)

2. But this mode of delivery has no application to the ordinary business of railways as common carriers of goods. The transportation being confined to a given line, according to the ordinary and reasonable course of business, goods must be delivered and received at the stations of the company. And unless they adopt a different course of business, so as to create a different expectation, or stipulate for something more, there is no obligation to

¹ *Hyde v. Trent & Mersey Navigation Co.*, 5 T. R. 389. In this case the carrier charged for cartage to the house of the consignee. In *Stephenson v. Hart*, 4 Bing. 476, it was considered a proper inquiry for the jury, "whether the defendants had delivered the box according to the due course of their business as carriers." *Golden v. Manning*, 2 W. Bl. 916; 3 Wils. 429, 438. See also *Bartlett v. The Philadelphia*, 32 Mo. 256. In *Tooker v. Gormer*, 2 Hilton, 71, it is held, that where the goods are intrusted to a carrier with a bill to collect, he is liable for a delivery without exacting payment. *Wardell v. Mourillyan*, 2 Esp. 693; *Storr v. Crowley*, McClel. & Y. 136.

² *Duff v. Budd*, 3 Brod. & B. 177. And the carrier may withhold the goods from the actual consignee until he obtains proper evidence of his identity. *Finn v. Western Railroad Co.*, 102 Mass. 283. So, too, if the carrier deliver the goods at a different place from that named in the bill of lading, although one named in former consignments of the same parties, it will be a conversion. *Sanquer v. London & Southwestern Railway Co.*, 16 C. B. 163; 32 Eng. L. & Eq. 338; *Clafin v. Boston & Lowell Railroad Co.*, 7 Allen, 341. And the carrier may maintain an action in his own name for injury done to the property intrusted to him, and may recover the value of the property, which he will hold in trust for the owner. *Merrick v. Brainerd*, 38 Barb. 574. But in an action for the non-delivery of the goods, the owner cannot recover for an injury to the goods. *Nudd v. Wells & Co.*, 11 Wis. 407; *Hall v. Boston & Worcester Railroad Co.*, 14 Allen, 439.

(a) Delivery to the owner will excuse delivery to the consignee. *Brunswick v. United States Express Co.*, 46 Iowa, 677. So will taking on legal process. *Savannah, Griffin, & North Alabama Railroad Co. v. Wilcox*, 48 Ga. 482; *Robinson v. Memphis & Charleston Railroad Co.*, 16 Fed. Rep. 57. But the carrier must give immediate notice to the consignee, or he will be liable. *Robinson v. Memphis & Charleston Railroad Co.*, *supra*; *Ohio & Mississippi Railroad Co. v. Yoke*, 51 Ind. 181. And see *infra*, note (c).

receive or to deliver freight in any other mode. But where such companies contract to receive or to deliver goods at other places, or where such is the course of their business, they are undoubtedly bound by such undertakings, or by such usage and course of business.³ (b)

* 3. The cases to some extent regard the question, when the duty of the carrier ends, as one of fact or contract, to be determined by the jury, with reference to the mode of transportation, the special undertaking, if any, the course of business at the place, and other attending circumstances. It finally resolves itself often into the inquiry whether the carrier did all, in respect to the goods, which under the peculiar duties of his office, the owner had a right to expect of him.³ (c)

* *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186, 209; s. c. 2 Redf. Am. Railw. Cas. 52; *Noyes v. Rutland & Burlington Railroad Co.*, 27 Vt. 110; s. c. 2 Redf. Am. Railw. Cas. 150; 1 Parsons Cont. 661, and note on *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, where a delivery by a steamboat carrier of a package of money to a wharfinger according to its custom was held to discharge the carrier.

(b) If the company exacts payment of cartage in advance, that will import a contract to deliver at the consignee's place of business. *Cahn v. Michigan Central Railroad Co.*, 71 Ill. 96. A custom to deliver cars of certain kinds of freight at or near the consignee's place of business is binding. *Pittsburg, Cincinnati, & St. Louis Railway Co. v. Nash*, 43 Ind. 428. The practice of a company to deliver to a carter where the consignee does not furnish his own carter or give directions, does not constitute a custom to deliver at the consignee's place of business. *Ib.*

(c) Where the carrier delivers to the wrong person he is liable, as well where the misdelivery occurs by fraud practised upon him as where it occurs by mistake. *Scheu v. Erie Railway Co.*, 10 Hun, 498; *Little Rock, Mississippi River, & Texas Railway Co. v. Glidewell*, 39 Ark. 487; *Houston &*

Texas Central Railway Co. v. Adams, 49 Tex. 748. And see *Baltimore & Ohio Railroad Co. v. Pumphrey*, 59 Md. 390. But see *Lake Shore & Michigan Southern Railway Co. v. Hodapp*, 83 Penn. St. 22, where goods were delivered to wrong person by reason of misdirection, and the company was held not liable. And delivery to another than the consignee, though the consignee has guaranteed and been compelled to pay the rent of the store at which they are delivered. *Mahon v. Blake*, 125 Mass. 477. Where there are two persons of the same name, the company may properly deliver to the one who claims them and produces the bill of lading, though the goods were supposed by the consignor to have been ordered by the other person. *Bush v. St. Louis, Kansas City, & Northern Railway Co.*, 3 Mo. Ap. 62.

4. But where the facts are not disputed, and the course of business of the carrier is uniform, the extent of the carrier's liability will become a question of law merely, as all such matters are under such circumstances.³ (d) And we understand the cases to have settled the question that the carrier by railway is neither bound to deliver to the consignee personally, or to give notice³ (e) of the arrival of the goods. But under peculiar circumstances as for instance, when the goods arrive out of time, or having failed to arrive in time and the consignee having frequently called for them, and made the utmost inquiry for them for twelve days, not only at the point of destination but at all other places where they might possibly have been sent by mistake, when the freight agent took his address and promised to give him notice whenever the goods should arrive, which occurred six days later and no notice was given; it was held, that under the circumstances, the defendants were bound to give notice, and that the promise of the freight agent was binding upon the company, any rule or custom of the office notwithstanding. But it was here considered * that the owner could not, under these circumstances, treat the goods as lost, and recover accordingly.⁴ (f)

³ *Tanner v. Oil Creek Railroad Co.*, 53 Penn. St. 411. There has been some controversy in the grain-growing regions, as to the duty of the railways, in transporting grain in bulk, to deliver at elevators connected by switches with the line of railway. The Illinois Supreme Court has decided that it is the duty of railways to deliver in such cases, and that they could not discriminate between different elevators, equally accessible to their line, by contracting with the proprietors of some to deliver exclusively at their elevators, it being inconsistent with their public duty, which obliged them to treat all alike, to enter into any such exclusive obligation. *Chicago & Northwestern*

(d) The delivery must be made at a place suitable and reasonable for the consignee to receive it, and what is such a place is a question for the jury. *Jewell v. Grand Trunk Railway Co.*, 55 N. H. 84. To deliver by leaving the goods on the bank of a river at the point of destination, in the absence of the consignee and not under care of the carrier's agents, is negligence. *Dresbach v. California Pacific Railroad Co.*, 57 Cal. 462.

(e) *South & North Alabama Rail-*

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road Co. v. Wood, 9 Am. & Eng. Railw. Cas. 419; *Eaton v. St. Louis, Iron Mountain, & Southern Railway Co.*, 12 Mo. Ap. 386; *Pinney v. St. Paul & Pacific Railroad Co.*, 19 Minn. 251.

(f) A railroad company will not be compelled to deliver at an elevator not on its line, but its line includes track which it has a legal right to use. *Hoyt v. Chicago, Burlington, & Quincy Railroad Co.*, 93 Ill. 601.

5. The rule of law and the course of business in regard to carriage by water have always been considered different from land carriage. In regard to foreign carriage, it is perfectly well settled that a delivery at the wharf, with notice, and some of the cases say even without notice, unless there be some special undertaking in the bill of lading, is sufficient. The consignee is presumed to have received from his correspondent a copy of the bill of lading, and is bound to take notice of the arrival of the ship.⁵ A distinction has been attempted in some of the cases, between the foreign and internal and coasting carrying business, in regard to the delivery or landing upon the wharf being sufficient to exonerate the carrier.⁶

6. But the cases all agree that in regard to carriers by ships and steamboats, nothing more is ever required, in the absence of special contract, than landing the goods at the usual wharf, and giving notice to the consignee, and keeping the goods safe a suf-

Railway Co. v. People, 56 Ill. 365. But it was further considered that such companies were not obliged to obtain the right of passage over other lines, or even to exercise such right of passage as they already possessed, in order to deliver grain at a particular elevator to which it had been consigned. *People v. Chicago & Alton Railroad Co.*, 55 Ill. 95.

⁵ *Cope v. Cordova*, 1 Rawle, 203, opinion of ROGERS, J.; *Angell Car.* §§ 312, 313, *et seq.*; 2 Kent Com. 604, 605.

⁶ *Ostrander v. Brown*, 15 Johns. 39, where it was held that such a deposit is not sufficient; but the carrier must continue his custody till the consignee has had sufficient time, after the landing of the goods and notice, to come and take them away. *Hemphill v. Chenie*, 6 Watts & S. 66; *Barclay v. Clyde*, 2 E. D. Smith, 95. If goods be consigned to a particular warehouse, a delivery at a pier in the place, but not at the warehouse, is not sufficient. *Sultana v. Chapman*, 5 Wis. 454. See also *Sleade v. Payne*, 14 La. An. 453, where the question of delivery and notice is considerably discussed. In *Washington v. Ayres*, 5 Am. Law Reg. N. S. 692, in the United States Circuit Court before Chief Justice CHASE, the question is carefully examined, and it is held that the duty of a carrier by water is not fulfilled by simple transportation from port to port; that the goods must be landed, and the consignee notified of their arrival; that where goods were landed from a vessel and stored in the carrier's storehouse until the consignee should call for them, but no notice of their arrival was given him, proof that such was the carrier's general custom will not relieve him from liability for damage to the goods after such storage, unless there is proof of assent by the owners to such arrangement, that a contract of affreightment, to be performed on tidal waters or navigable rivers wholly within the limits of a state, is a maritime contract within the admiralty jurisdiction of the federal courts.

ficient time after to enable the party to take them away. After that the carrier may put them in warehouse, and will only be liable as a * depositary, for ordinary neglect.⁷ And the prevailing opinion seems to be, at the present time, that the necessity of giving notice of the arrival of the goods depends upon custom and usage, and the course of business at the place.⁸ The course of doing business upon railways, their being confined to a particular route, having stated places of deposit, and generally erecting warehouses for the safe-keeping of goods, all seem to require that the same rule, as to the delivery of goods, should prevail, which does in transportation by ships and steamboats.⁹ Accordingly it was held, that the proprietors of a railway, who are common carriers of goods, and who when they arrive at their destination, deposit them in their warehouse, without additional charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers, for the loss of the goods by fire, without negligence or default on their part, after the goods are unladen from the cars and placed in the warehouse, but are liable only for ordinary neglect as warehousemen. And it will make no difference, it is here said, in regard to the liability of the carriers, that the goods were destroyed by fire, in the warehouse, before the owner or consignee had opportunity to take them away.¹⁰ (g) This * last proposition is perhaps not in strict

⁷ *Garside v. Trent & Mersey Navigation Co.*, 4 T. R. 581; *In re Webb*, 8 Taunt. 443; s. c. 2 J. B. Moore, 500; 2 Kent Com. 605. See *Dean v. Vaccaro*, 2 Head, 488.

⁸ *Price v. Powell*, 8 Comst. 323; *Huston v. Peters*, 1 Met. 558. But in *Dean v. Vaccaro*, *supra*, it is held that the usage or custom of a particular place cannot dispense with delivery or notice of the landing of the goods. See also *Rowland v. Miln*, 2 Hilton, 150, where it is held that a prevention of the landing of the goods by a person without legal authority does not relieve the carrier of his responsibility.

⁹ *Norway Plains Co. v. Boston & Maine Railroad Co.*, 1 Gray, 263; s. c. 2 Redf. Am. Railw. Cas. 152, opinion of SHAW, C. J., 272. Opinion of court in *Farmers' and Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 211; s. c. 2 Redf. Am. Railw. Cas. 52.

¹⁰ *Norway Plains Co. v. Boston & Maine Railroad Co.*, 1 Gray, 263; s. c. 2 Redf. Am. Railw. Cas. 152. It is there said that the company is not obliged to give notice to the consignee of the arrival of the goods. Indeed that point is virtually decided. For if there is any obligation to give notice, there is also,

(g) The duty of the carrier as carrier of goods at their destination, nor with the carrier does not end with deposit of the goods at a warehouseman. It continues until delivery to a warehouseman. It con-
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accordance with most of the cases upon the subject under analogous circumstances. In a case in New Hampshire,¹¹ the rules of

to keep the goods a sufficient time after to enable the party to remove them. And in this case there was no opportunity to remove them, after the arrival. If there is any ground to question this decision, it is because there was no opportunity to remove the goods after their arrival. See *Morris & Essex Railroad Co. v. Ayers*, 5 Dutcher, 393. Where goods transported by a railroad arrive at the place of destination, and are placed on the platform of the depot, at the usual place of discharging goods, ready for delivery to the consignee in good order, and he is notified of their arrival and pays the freight on them, the liability of the company as carriers is at an end. If the consignee does not receive the goods, it seems that the carrier must take care of them for a reasonable time for the consignee, but his liability in that respect is that of a warehouseman and not that of a carrier. But where the consignee has notice of the situation of the goods at the place of delivery, and pays the freight on them, and afterwards without neglect on the part of the warehouseman the goods are destroyed, the warehouseman is not liable. It seems, indeed, that the payment of the freight under such circumstances, without any arrangement as to the further custody of the goods by the warehouseman, is equivalent to a delivery so far as to throw the risk of loss on the consignee. *New Albany & Salem Railroad Co. v. Campbell*, 12 Ind. 55. As to the delivery of goods at the place of destination, see *Fenner v. Buffalo & State Line Railroad Co.*, 44 N. Y. 505; *Francis v. Dubuque & Sioux City Railroad Co.*, 25 Iowa, 60.

¹¹ *Smith v. Nashua & Lowell Railroad Co.*, 7 Fost. N. H. 86.

tinues long enough to enable the consignee, if diligent, to examine and remove them. *Bell v. St. Louis, Iron Mountain, & Southern Railroad Co.*, 6 Mo. Ap. 363; *Leavenworth, Lawrence, & Galveston Railroad Co. v. Maris*, 16 Kan. 333. Nor, where goods are in bond for duties and to go to a bonded warehouse, will the liability as carrier end on arrival at destination, if the carrier neglects to give notice of arrival to the consignee or the proper revenue officer. *Chicago & Northwestern Railway Co. v. Sawyer*, 69 Ill. 285. What is a reasonable time for the consignee to examine and remove the goods does not depend on distance, convenience, or necessities of the consignee. It is such a time as would enable one living in the vicinity to examine, &c., in the usual course, and within the

usual hours of business. *Leavenworth, Lawrence, & Galveston Railroad Co. v. Maris*, *supra*; *Pinney v. St. Paul & Pacific Railroad Co.*, 19 Minn. 251. But see *Mohr v. Chicago & Northwestern Railway Co.*, 40 Iowa, 579; *Chicago & Northwestern Railway Co. v. Bensley*, 69 Ill. 630, which seem to hold to the rule stated in the text. And see *Rothschild v. Michigan Central Railroad Co.*, 69 Ill. 164; *Faulkner v. Hart*, 44 N. Y. Superior Ct. 471; *Lemke v. Chicago, Milwaukee, & St. Paul Railway Co.*, 39 Wis. 449; *Chapman v. Great Western Railway Co.*, Law Rep. 5 Q. B. 278. Goods deposited on the station platform and left there two days after freight is paid, awaiting the services of a truckman, are delivered, in contemplation of law. *Chalk v. Charlotte, Columbia, & Augusta Railroad Co.*,

the liability of the carrier and the warehouseman are both stated somewhat differently from that laid down in the last case. In regard to the liability of the carrier, as such, it is said it will continue till discharged, "by a delivery of the goods to the bailor, or a tender or offer to deliver them, or such act as the law regards as equivalent to a delivery, as for instance in some cases, by depositing them in the warehouse of a responsible person." No intimation is here given that a deposit merely in the carriers' own warehouse is sufficient to release the carriers. And in a case in Wisconsin,¹² it was decided that the consignee must have a reasonable opportunity to remove the goods after their arrival, before the carrier's duty as such terminates; but the question of reasonable time for that purpose will not be affected by any peculiarity in the condition of the consignee making it convenient for him to have a longer time than under other and ordinary circumstances. But where the goods arrived at the station about sundown Saturday, and were taken from the cars and placed in the warehouse of the company about dark, and the warehouse closed a few minutes after, and before Monday burnt with the goods, without the fault of the company, the plaintiff residing about three-fourths of a mile from the station, and his teamster * having called for the goods about three o'clock of that afternoon, and being told by the freight agent that he need not come again that day, as it would be late before the train would arrive, but after dusk he was informed that the goods had come, it was held the company were liable as common carriers.

¹² *Wood v. Crocker*, 18 Wis. 345. See also *Alabama & Tennessee Rivers Railroad Co. v. Kidd*, 35 Ala. 209, where the same general rule of responsibility for goods after arrival at the place of destination is maintained. It is also said, that if the carrier specially undertake for warehousing, he is responsible for the neglect of any warehouseman to whom he delivers the goods; and the carrier will be bound to warehouse according to his general and well-known custom, and cannot excuse himself by a usage of a few weeks, not generally known or not known to the consignee.

85 N. C. 423. It is the duty of the carrier, where the consignee is unknown, to exercise reasonable diligence in the effort to find him. *Sherman v. Hudson River Railroad Co.*, 64 N. Y. 254. But see *Gashweiler v.*

Wabash, St. Louis, & Pacific Railroad Co., 83 Mo. 112, which holds that the liability of the carrier, as such, ends where the goods are unloaded at destination, and that notice to the consignee is not necessary to that end.

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7. And upon principle, it seems more reasonable to conclude that the responsibility does not terminate, until the owner or consignee, by watchfulness, has had, or might have had, an opportunity to remove them.^(h) This is certainly so to be regarded, if the building of warehouses by railways is to be considered not a necessary part of their business as carriers, but solely for their own convenience. It seems to be settled that the depositing of freight in their warehouses, at the time of receiving it, is to be so regarded, unless there are special directions given, and that the responsibility of the carrier attaches presently upon the delivery.¹⁸

8. There is then no very good reason, as it seems to us, why the responsibility of the carrier should not continue until the owner or consignee, by the use of diligence, might have removed the goods. The warehousing seems to be with that intent, and for that purpose. And if we assume, as we must, we think, that there is no obligation upon railway carriers to give notice of the arrival of the goods, there does still seem to be reason and justice in giving the consignee time and opportunity to remove the goods, by the exercise of the proper watchfulness, before the responsibility of the carrier ends. In the case of *Smith v. Nashua & Lowell Railway*,¹¹ it is held that there is no duty upon railway carriers to store goods, after the consignee has notice of their arrival, and reasonable time to remove them. Of course, then, there is no absolute duty to keep warehouses, provided the company choose to give notice of the arrival of goods, in every case, and suffer them to remain in their cars until the consignee has reasonable opportunity to remove them. It is only for their own convenience in keeping goods to be carried, till the train is ready to depart, or after their arrival until the consignee has reasonable opportunity to remove them. After that there is no doubt the carrier's responsibility as such, ceases, and if the goods remain in the warehouse of the company, it is only with the responsibility of ordinary *bailees for hire, as held in *Norway Plains Co. v. Boston & Maine Railway*,¹⁰ or as was held in *Smith v. Nashua & Lowell Railway*,¹¹ with the responsibility of a bailee without compensation. The former degree of responsibility seems to us

¹⁸ *Supra*, § 174, and cases cited; *McCarty v. New York & Erie Railway Co.*, 30 Penn. St. 247.

(h) See *supra*, note (g).

the just and reasonable one, as it is an accessory of the carrying business, and the carrier, after he becomes a warehouseman, is no doubt fairly entitled to charge, in that capacity; the omission to charge for warehousing, in the first instance, being the result of the course of the business, and because it is a part of the carrier's duty to keep the goods safely till the consignee has opportunity, by the use of diligence, to remove them. And this seems to us the extent of the decision in *Thomas v. Boston & Providence Railway*.¹⁴ This point is there very distinctly stated, by HUBBARD, J.: "And where such suitable warehouses are provided, and the goods *which are not called for on their arrival at the places of destination*, are unladed and stored safely in such warehouses, the duty of the proprietors as common carriers, is, in our judgment, terminated." (i)

9. But when the same rule is applied to goods arriving out of time, and before the consignee could have removed them, reason and justice seem to us to require that if the company put them into their warehouse, for their own convenience, their responsibility as carriers should not be thereby terminated, until the consignee has reasonable opportunity to remove them.¹⁵ We should

¹⁴ 10 Met. 472. In this case the action was for one roll of leather, out of four, lost in the defendants' warehouse. The four rolls arrived on the train, and were deposited in the warehouse. The freight was paid on all, and all were pointed out to the teamster. He called for them at the depot, but carried away only two of them. After this the loss occurred. There could be no doubt that the goods were remaining in the warehouse for the convenience of the owner, and after a reasonable time for their removal had elapsed. There could be no question whatever that the decision is fully justified, and that it comes fairly within the principle of the case of *Garside v. Trent & Mersey Navigation Co.*, 4 T. R. 581, on the authority of which it professes to go. See also *Hilliard v. Wilmington*, 6 Jones N. C. 348.

¹⁵ *Michigan Central Railroad Co. v. Ward*, 2 Mich. 538. In this case, notice of the arrival of the goods is held necessary to terminate the responsibility of the carrier. But the statute in that state provides, that the responsibility of the carrier as carrier shall cease, after notice of the arrival of the goods a sufficient time to enable the consignee to remove them, and the court considered, that, by consequence, it will continue till that period. And in

(i) When the consignee neglects will be a constructive delivery. *Bradshaw v. Irish Northwestern Railway Co.*, 7 Ir. Com. Law, 252.

therefore * have felt compelled to rule the case of *Norway Plains Co. v. Boston & Maine Railway* in favor of the plaintiffs. But in

Rome Railroad Co. v. Sullivan, 14 Ga. 277, the same rule in regard to notice is adopted on general principles.

In *Moses v. Boston & Maine Railroad Co.*, 32 N. H. 523; s. c. 2 Redf. Am. Railw. Cas. 165, the court takes precisely the view stated in the text. There a quantity of wool arrived at the company's station, the place of its final destination, about three o'clock in the afternoon. In the usual course of business, from two to three hours were required to unload the freight, and the gates were closed at five o'clock, so that no goods could be removed from the warehouse after that hour, until the next morning. During the night the warehouse and the wool therein were destroyed by fire. It was held, that the responsibility of railway company as common carrier continued until the goods were ready to be delivered at the place of destination, and the owner or consignee had a reasonable opportunity, during the hours when such goods are usually delivered there, of examining them so far as to judge from their outward appearance whether they were in proper condition, and to take them away. *s. p. Graves v. Hartford & New York Steamboat Co.*, 38 Conn. 143. But it was also held, that the consignee must take notice of the course of business at the station, and the time of the arrival of the train when his goods might be expected, and be ready to receive them in a reasonable time after their arrival, and when in common course of business they might fairly be expected to be ready for delivery. It was also held, that the common-law liability of the carrier as to goods in his warehouse, before and after the transportation, could not be restricted by a mere notice brought home to the knowledge of the owner. *Moses v. Boston & Maine Railroad Co.*, 4 Fost. N. H. 71; *s. p. Fenner v. Buffalo & State Line Railroad Co.*, 44 N. Y. 505; *Jeffersonville Railroad Co. v. Cleveland*, 2 Bush, 468.

Where goods in warehouse, on arrival at destination, are carried away by some one by mistake, and without the fault of the carrier's agents, the carrier is not liable. But if the carrier's agents deliver them either positively or permissively, to the wrong person, by mistake, the carrier is liable. And *prima facie* the carrier is liable for non-delivery, and the burden of proof is on him to show that the goods were lost without his fault, although he may not be able to show precisely the manner of the loss. *Lichtenhein v. Boston & Providence Railroad Co.*, 11 Cush. 70. See *Milwaukee & Mississippi Railroad Co. v. Fairchild*, 6 Wis. 403; *Boies v. Hartford & New Haven Railroad Co.*, 37 Conn. 272.

In the case of *Chicago & Rock Island Railroad Co. v. Warren*, 16 Ill. 502, it was held, that common carriers could not relieve themselves of their liability, as such, by depositing the goods in warehouse, until this was evinced by some open and distinct act. As if the storage were to be in the car, that must be separated from the train, and placed in the usual place for storage, in the care of a proper person, and that the proof of this change rested on the carrier. SCATES, C. J., says: "Goods may not be thrown down in a station-house or on a platform, at their destination, in the name and nature of delivery. The

justice to * the very elaborate opinion of SHAW, C. J., who has perhaps no superior upon this continent, as a wise and just expositor of the law, as a living and advancing study, we should give the substance of it in his own words did our space permit.¹⁶ We may be allowed to say that it seems * to us, the opinion and argument of the learned chief justice might, for the most part, be quite as well applied to the rule for which we contend, as to have reached the result which it did.

* 10. And where the consignee called for the goods after their arrival, and the station agent told him they were not there, and in * consequence they were not removed, but were destroyed by fire the same night, it was held the company were liable.¹⁷

11. And where the agent of the consignee requested the agent of the company to suffer the car in which was a block of marble, transported by them, to be removed to the depot of another railway, and he assented, and assisted in the removal of the car, and after the removal the agent of the consignee procured the use of the machinery of the second company to unload the block, which was broken through defect of such machinery, it was held the first company were not liable for such injury, and that their responsibility terminated when the marble was taken from their station, that being a virtual delivery to the consignee.¹⁸ And the

responsibility of the carrier must last till that of some other begins, and he must show it."

In *Crawford v. Clark*, 15 Ill. 561, it was held, that carriers by water, on landing goods, must give notice to the consignee or owner, and if he refuse to accept them, the carrier must safely secure them or he will be responsible for all loss or damage. And when the carrier had agreed to deliver goods in Pittsburgh, but kept them at his warehouse in Alleghany, to which he had removed some months before, as was the custom of the trade, until the aqueduct at Pittsburgh was completed, where the goods were destroyed by fire, without his fault, he was held responsible for the loss. *Gaff v. Bloomer*, 9 Penn. St. 114.

But where the carrier was directed to make sale of the goods at the point of destination, and after their arrival they were placed on deck, exposed for sale, and while in that state a portion was stolen without the fault of the carrier, he was held not responsible. *Labar v. Taber*, 35 Barb. 305.

¹⁶ See 2 Redf. Am. Railw. Cas. 152.

¹⁷ *Stevens v. Boston & Maine Railroad Co.*, 1 Gray, 277.

¹⁸ *Lewis v. Western Railroad Co.*, 11 Met. 509. And in *Kimball v. Western Railroad Co.*, 6 Gray, 542, it was held that the company was bound to use ordinary care and skill in unloading goods from the cars, even in cases where,

responsibility of the carrier, as such, it has been said, will not continue beyond a reasonable time to remove the goods, because he gives notice of the arrival, and requires the consignee to remove them within twenty-four hours,¹⁹ there being no obligation, as common carriers, either to give notice of the arrival or to keep the goods beyond the shortest convenient time after their arrival to enable the consignee to * remove them.²⁰ And in the mean time, no distinct charge for warehousing could properly be made; but after the duty of the carrier is fully performed, and the goods are allowed to remain in the company's warehouse for any considerable time, there is no good reason why they may not charge for warehouse services.²¹ But the onus of proof is always upon the company to show that their responsibility as carriers had terminated before any loss or damage occurred.²² The charter of the Michigan Central Railway Company empowers them to charge storage on all goods suffered to remain at their stations more than four days after arrival, except in Detroit, where the time is limited to twenty-four hours, and the company are required to notify the consignee four days in the one case or twenty-four hours in the other, before they charge storage, and the company are afterwards made responsible for goods awaiting delivery, as warehousemen,

by its regulations, it was made the duty of the consignee to unlade them within twenty-four hours after their arrival, and this was known to the consignee, who also had notice of the arrival of the goods more than twenty-four hours before the time of their being unloaded by the company's servants. In the absence of all contract or usage for the consignee to unlade the goods from ships, boats, or cars, and especially where they are bulky and of great weight, it seems reasonable that the carrier should assume the risk of unlading, under his responsibility as carrier; and such is the general course of the carrying business. The carrier is bound to provide himself with suitable and safe machinery for unlading, and where he uses the machinery of third persons at his own suggestion, for that purpose, he is liable for its sufficiency. *De Mott v. Laraway*, 14 Wend. 225.

¹⁹ *Richards v. Michigan Southern & Northern Indiana Railroad Co.*, 20 Ill. 404.

²⁰ *Porter v. Chicago & Rock Island Railroad Co.*, 20 Ill. 407; *Davis v. Michigan Southern & Northern Indiana Railroad Co.*, 20 Ill. 412; *Illinois Central Railroad Co. v. Alexander*, 20 Ill. 23. But if the carrier give notice to have the goods removed by a particular time, he virtually waives any claim to have them removed sooner.

²¹ *Illinois Central Railroad Co. v. Alexander*, *supra*.

²² *Wardlaw v. South Carolina Railroad Co.*, 11 Rich. 337.

and not as carriers. It was held that property on deposit at their stations was to be considered as awaiting delivery as soon as it was in a condition to be delivered to the consignee. The office of the notice is to fix the time for charging storage. It has no effect to extend the carrier's responsibility, as such, but does necessarily restrict it to the commencement of the duty as warehouseman, at the furthest.²³

12. Questions of some difficulty often arise, in regard to the custody of goods in warehouse, at intermediate stations, where there is no connection between the different routes over which the goods pass. We shall see that the general duty, in such cases, in this country especially, is, to carry safely, and deliver to the next carrier upon the route.²⁴ But cases will occur where there will be delay in effecting the connection. In such cases there can perhaps be no better rule laid down than that found in the opinion of BULLER, J., in *Garside v. Trent and Mersey Navigation Company*,²⁵ * which was a case precisely of this character. "The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods ; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly ; and it was only because there was no person ready at Manchester to receive these goods that the defendants were obliged to keep them."

13. But as a general rule, where the next carrier in the connection has a place of receiving goods, as in the case of railways, always open, and agents ready to receive them, it would probably be the duty of each preceding carrier to make immediate delivery to the next succeeding carrier in the line, at his place of receiving freight. (j) And this ordinarily fixes the carrier's liability.²⁶

²³ *Michigan Central Railroad Co. v. Hale*, 6 Mich. 243.

²⁴ *Infra*, § 180, and cases cited. In *Converse v. Norwich & New York Transportation Co.*, 33 Conn. 166, it was held, that where the subsequent carrier uniformly received freight from the connecting line on a particular platform by the side of the line, a delivery at that point fixed the responsibility of that carrier, and discharged the former one.

²⁵ 4 T. R. 583. And in every case where a warehouseman or forwarding merchant ships goods, it is his duty to advise the consignee of it immediately. *Railey v. Porter*, 82 Mo. 471.

²⁶ *Supra*, § 174, pl. 4. And it affords no legal excuse to the first carrier for

(j) The succeeding carrier is the receive delivery; and the liability of agent of the owner or consignee to the preceding carrier continues until

In this mode a continuous liability of carriers is kept up throughout the line, which it seems to us is the true policy of the law upon this subject, where it can fairly be done, and without injustice to any particular carrier.

14. Difficult questions often arise, too, in this connection, where the goods are directed, at an intermediate station in the course of their transit, to the care of persons who sustain the double capacity of forwarding merchants and carriers. In such cases, they are more commonly held liable as carriers, the consignment being presumed to have been made to them in that capacity.²⁷

15. And where a package delivered to a common carrier for transportation, is addressed to the care of the agent and principal representative of the carrier at the point where the carriage is to terminate, this will not make such agent the consignee of the goods, so as to terminate the carrier's responsibility upon delivery to him.²⁸

* 16. And where goods have been tendered to the consignee and refused by him, there is no rule of law that the carrier is bound to give notice to the consignor; he is only bound to do what is reasonable, and that is a question for the jury under all the circumstances.²⁹

17. In one case,³⁰ where the subject is very extensively delaying the delivery to the next one in the line, that there is a block of freight on that line. *McLaren v. Detroit & Milwaukee Railroad Co.*, 28 Wis. 138.

²⁷ *Teall v. Sears*, 9 Barb. 817. Here goods were shipped from Albany on the canal, with a bill of lading, — "Three cases of goods, A. B. Chase, Chicago, by vessel, care of Sears & Griffith, Buffalo," — and were received at Buffalo by Sears & Griffith, who were principally employed in the commission and forwarding business, but had some slight interest in transportation on the lakes, west, and who forwarded the goods to Chicago, by a transient vessel. Suit being brought against them for one case of the goods which did not arrive, it was held that they were liable as carriers and not as forwarding merchants merely.

²⁸ *Russell v. Livingston*, 16 N. Y. 515.

²⁹ *Hudson v. Baxendale*, 2 H. & N. 575. *Infra*, pl. 25; pl. 30, and notes.

³⁰ *Great Western Railway Co. v. Crouch*, 3 H. & N. 182; s. c. *infra*, § 188, pl. 16, and note.

the goods are ready for delivery to such agent, and he has had a reasonable time to take them. *Wood v. Milwaukee & St. Paul Railway Co.*, 27 Wis. 541. And a reasonable time is the shortest practicable time, not measured by any peculiar circumstances.

cussed in the Exchequer Chamber before all the judges, and where the opinions are delivered *seriatim* with but slight disagreement, a parcel was tendered to the consignee, and not being accepted was sent back to the consignor without reasonable delay, as the jury found. About two hours after it was first tendered to the consignee, he called for it, and tendered all charges claimed, but was told it had been returned to the consignor. The jury found that the tender of the charge for the carriage was made within a reasonable time after the parcel had been refused. It was held that the carrier was liable for a breach of duty, even supposing his duty as carrier ended by the tender of the parcel. The judges here put stress upon the fact that the carrier should do what is reasonable in such cases, what will be most likely to be for the interest of the owner.

18. It seems to be settled in the American courts, that where the consignee cannot be found or refuses to accept the goods, the carrier is not in general at liberty to abandon them or remove them to any remote place. He is bound to keep them as carrier, until the owner or consignee, by the use of diligence, has time to remove them, when his duty as carrier ceases.³¹ After that he is bound to keep them as a careful and prudent man would be likely to keep his own goods of the same class, and according to his means. It is not always that the carrier is provided with ample means of warehousing goods after his duty as carrier is ended. But he should do the best his means will enable him to do, and his means should be reasonable according to his usual business.³²

* 19. There seems to be no question but that the carrier will be justified in putting goods, not called for in a reasonable time and where no duty of personal delivery or giving notice exists, and also such goods as are not accepted by the consignees, into warehouse. And this he may do in his own warehouse or that of others, according to the usual course of business at the point.³³

³¹ *Supra*, § 175, pl. 8. But in *Buckley v. Great Western Railway Co.*, 18 Mich. 121, it is said that, in the absence of special circumstances, the carrier is liable as such, while the goods are in his warehouse awaiting delivery. This question is somewhat affected by statute there.

³² *Ostrander v. Brown*, 15 Johns. 39; *Hemphill v. Chenie*, 6 W. & S. 62; *Moses v. Boston & Maine Railroad Co.*, 32 N. H. 523; s. c. 2 Redf. Am. Railw. Cas. 165; *Smith v. Nashua & Lowell Railroad Co.*, 7 Fost. N. H. 86; *Eagle v. White*, 6 Whart. 505.

³³ *Thomas v. Boston & Providence Railroad Co.*, 10 Met. 472; *Fisk v.*

20. If a carrier by water cannot find the consignee, or his agent, at the port of destination, he may exonerate himself from further responsibility, by delivery to a responsible warehouseman. And where this is done, the warehouseman paying all of the charges of the carrier, the intendment of law is, in the absence of all evidence to the contrary, that the bailment is made on behalf of the consignee, and it will be so regarded, even where the goods are never called for; and the carrier cannot reclaim the goods on repayment of the charges.³⁴

21. In a recent English case, where cattle arrived at the point of destination on Sunday, and by law, could not be removed until after midnight, it was held, the responsibility as carrier ceased upon the arrival of the train, and placing the cattle in condition to remain, until they could be removed. *MARTIN, B.*, dissenting. Upon principle the law would seem to be with the dissenting judge, since the owner could not remove the goods until after midnight, and in the mean time the risk should fall upon the carrier, if there was no fault of the owner.³⁵

22. The general principle that the carrier's responsibility continues throughout the transitus in all modes of transportation, is most unquestionable.³⁶ And in the early cases, where the consignees are not ready to accept, the precise point of termination is fixed at the moment when the crane of the warehouseman is attached to raise the goods into the warehouse.³⁷

* 23. It has been held that the carrier cannot excuse himself for non-delivery of the goods on the ground of unlawful seizure of the same by government officers,³⁸ nor on the ground of an in-

Newton, 1 Denio, 45; *McCarty v. New York & Erie Railroad Co.*, 30 Penn. St. 247, 250; *Goold v. Chapin*, 10 Barb. 612; *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 86, 211; s. c. 2 Redf. Am. Railw. Cas. 52; *Norway Plains Co. v. Boston & Maine Railroad Co.*, 1 Gray, 263; s. c. 2 Redf. Am. Railw. Cas. 152; *Chicago & Rock Island Railroad Co. v. Warren*, 16 Ill. 502; *Bansemmer v. Toledo & Wabash Railway Co.*, 25 Ind. 434. Carrier not exonerated until goods reach safe deposit in warehouse. *Rice v. Boston & Worcester Railroad Co.*, 98 Mass. 212.

³⁴ *Hamilton v. Nicholson*, 11 Allen, 308. If the carrier desire to make a bailment on his own behalf, he should make it special.

³⁵ *Shepherd v. Bristol & Exeter Railway Co.*, Law Rep. 3 Exch. 189; *supra*, § 175, pl. 7, 8, and cases cited.

³⁶ *Coates v. Railton*, 6 B. & C. 422; *Crawshay v. Eades*, 1 B. & C. 181.

³⁷ *Thomas v. Day*, 4 Esp. 262; *Quiggin v. Duff*, 1 M. & W. 174.

³⁸ *Gosling v. Higgins*, 1 Camp. 451.

valid claim of lien.³⁹ Nor will a lawful seizure and condemnation by the courts of a foreign country be any excuse to the carrier, the owner not being in fault.⁴⁰ Nor will the attachment of the goods upon process against one having no interest in them.⁴¹ (*k*)

24. Delivery to the consignee must be according to the course of business and the usages of the trade at the port of destination. It may be by delivery on board the lighter,⁴² or by depositing the goods on the wharf of the warehouseman, wharfinger, or of the consignee or owner.⁴³ But a delivery or tender of the goods must be in a reasonable time, place, and manner, of which the jury are the judges.⁴⁴ And if goods are tendered after the close of business hours, or when the owner cannot receive them, the carrier is not thereby released.⁴⁵

25. But if goods are tendered in proper time, place, and manner, to the owner or consignee, and refused, the carrier is released, as such, and is thereafter only responsible as an ordinary bailee. And it will not prevent this result that the tender is made on a fast day, appointed by the Governor of the state, it not being made a public holiday by the laws of the state.⁴⁶

26. But any reasonable arrangements between the carrier and the consignee as to the mode of delivery will be held binding, and the carrier exonerated by delivery in the mode thus stipulated.⁴⁷

³⁹ *Storr v. Crowley, McClel. & Y.* 129, 136. If the carrier offer the goods at the house of the consignee, and be compelled to carry them back to the warehouse because the hire is not ready to be paid, he may treat his responsibility, as carrier, as terminated. But if both parties treat it as continuing until actual delivery, he is responsible until that event, in his capacity of carrier. *Ib.*

⁴⁰ *Spence v. Chodwick*, 10 Q. B. 517; *Atkinson v. Ritchie*, 10 East, 530.

⁴¹ *Edwards v. White Line Transit Co.*, 104 Mass. 159. See also *Stiles v. Davis*, 1 Black, 101.

⁴² *Strong v. Natally*, 1 N. R. 16.

⁴³ *Blin v. Mayo*, 10 Vt. 56.

⁴⁴ *Hill v. Humphreys*, 5 Watts & S. 123; *Segura v. Reed*, 3 La. An. 695.

⁴⁵ *Hatham v. Ely*, 28 N. Y. 78.

⁴⁶ *Richardson v. Goddard*, 23 How. 28. Nor will the fact that the goods arrive on the fourth of July extend the time of the carrier's responsibility for their safety. *Ely v. New Haven Steamboat Co.*, 53 Barb. 207. Nor is the carrier bound to notify the consignor if the goods are refused by the consignee. *Kremer v. Southern Express Co.*, 6 Cold. 356.

(*k*) But see, as to seizure under *peka*, & *Santa Fe Railroad Co.*, 18 process, *McVeagh v. Atchison, To- Am. & Eng. Railw. Cas.* 651

And he will be held responsible for any injury to the goods resulting from not delivering in conformity with the arrangements.⁴⁷

27. It seems to be the settled rule in regard to carriers by water, that they must make delivery at the proper wharf, and * give notice either to the owner or consignee, in time to enable him to take charge of the goods, or else put them in safe custody and warehouse, so that they can be safely preserved, until the person interested can remove them, or assume charge himself.⁴⁸ And it will not excuse the carrier, that the master of a vessel wrongfully refused to sign bills of lading, and is therefore ignorant of the names of the consignees,⁴⁹ or that for any other reason, the carrier is ignorant of the names or residence of the consignees.⁵⁰ But this general rule will be controlled by the express direction of the consignor,⁵¹ and by the custom of the trade, or the usage of the particular place; but that should very distinctly appear, otherwise the general reasonableness of the rule, that timely notice shall be given the consignees, or else the goods put in safe condition to remain until called for, will prevail.

28. And it has been held by the English courts, that the carrier by railway has no right to impose a charge for the conveyance of goods to and from the station, where the customer does not require such service to be performed by him.⁵²

29. The English statute prohibiting carriers from making any discrimination for or against any of their customers, will not allow them to keep their goods' station open for the delivery of goods after their usual time of closing it as to other persons,⁵³ or of carrying for particular ones who have large amounts of freight, at prices below their usual rate.⁵⁴

30. Since the former edition, the duty of carriers, where goods are refused at the consignee's address, has been considered by the

⁴⁷ *The Grafton*, 1 Blatchf. C. C. 173.

⁴⁸ *The Peytona*, 2 Curt. C. C. 21; *Scholes v. Ackerland*, 15 Ill. 474; *Segura v. Reed*, 3 La. An. 695; *Herman v. Goodrich*, 21 Wis. 536.

⁴⁹ *The Peytona*, *supra*.

⁵⁰ *Galloway v. Hughes*, 1 Bailey, 553. He should have informed himself of the name of the consignee.

⁵¹ *Ide v. Sadler*, 18 Barb. 32.

⁵² *Garton v. Bristol & Exeter Railway Co.*, 6 C. B. n. s. 639. See also *Ransome v. Eastern Counties Railway Co.*, 1 C. B. n. s. 437, 2 Law T. n. s. 376; s. c. 6 Jur. n. s. 908.

Court of Exchequer,⁵³ and the rule declared, that the carrier is thereafter relieved of his duty, as carrier, and only responsible as an involuntary bailee, and bound to act with reasonable care and caution with respect to the goods.⁵⁴

31. It seems to be most unquestionable, that the owner of goods in the course of transportation has the right to alter their destination at any time during the transit.⁵⁵ But where there is a special contract in regard to the transportation it may entitle the carrier to demand the freight already earned.⁵⁶

32. Where goods were carried to their destination by a common carrier, and the consignee informed of their arrival, and that they could remain in the car for twenty-four hours, but that after that time the carrier reserved the right to unload them in the most convenient place for so doing, and would not be responsible for any damages which might accrue in consequence, it was held that if the carrier unloaded the goods before the expiration of the twenty-four hours he was responsible for all damage, as common carrier; but if after that time, he would only be responsible for the exercise of ordinary care.⁵⁷

*SECTION X.

General Duty of Carriers. — Payment in Advance. — Equality of Charges. — Special Damage.

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| 1. Common carriers bound to carry for all who apply.
2. May demand freight in advance. Refusal to carry excuses tender.
3. Payment of freight and fare will sometimes be presumed.
4. Excuses for not carrying or not delivering. | n. 15. Equality of charges. English statutes.
5. Goods may be rated according to custom.
6. Carriage of goods must be in the order in which they are received.
7. Carrier not bound, in absence of statute, to carry for all at same price, where there is reason for difference. |
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§ 176. 1. It is a well settled principle of the law applicable to common carriers, both of goods and passengers, that they are

⁵³ *Heugh v. London & Northwestern Railway Co.*, Law Rep. 5 Exch. 51.

⁵⁴ *Supra*, pl. 25, note 46.

⁵⁵ *Strahorn v. Union Stockyard & Transit Co.*, 43 Ill. 424.

⁵⁶ *Withers v. Macon & Western Railroad Co.*, 35 Ga. 273.

⁵⁷ *Cook v. Erie Railway Co.*, 58 Barb. 312.

bound to carry for all persons who apply, unless they have a reasonable excuse for the refusal to do so.¹ (a) Carriers of goods and passengers, who set themselves before the public as ready to carry for all who apply, become a kind of public officers, and owe to the public a general duty, independent of any contract in the particular case.²

2. The carrier is entitled to demand his pay in advance, but if no such condition is insisted upon at the time of the delivery of the goods, the owner is not obliged to tender the freight, nor in an action is it necessary to allege any contract to pay a stated price for carriage, or more than a willingness and readiness to pay a reasonable compensation to the carrier.³ Where * one is

¹ *Benett v. Peninsular Steamboat Co.*, 6 C. B. 775; *Story Bailm.* § 591; *Lovett v. Hobbs*, 2 Show. 127; *Jencks v. Coleman*, 2 Sumner, 221, 224. But a carrier from one place to another is not bound to carry between intermediate places. *Thurman v. Wells*, 18 Barb. 500.

² *Bretherton v. Wood*, 3 Brod. & B. 54; s. c. 9 Price, 408.

³ *Bastard v. Bastard*, 2 Show. 81. It is here said, "For perhaps there was no particular agreement, and then the carrier might have a *quantum meruit* for his hire." *Lovett v. Hobbs*, 2 Show. 129 and notes, *Rogers v. Head*, Cro. Jac. 262. *Jackson v. Rogers*, 2 Show. 327, holds the general principle that the carrier is liable to an action if he refuse to carry goods, "though offered his hire," if "he had convenience to carry the same," which seems to presuppose that both are conditions precedent to the liability. *Pickford v. Grand Junction Railway Co.*, 8 M. & W. 372; *Galena & Chicago Railway Co. v. Rae*,

(a) *Rutherford v. Grand Trunk Railway Co.*, 20 L. C. Jur. 11. Where the company refuses, and an action is brought for damage, the plaintiff may show that the goods were thereby injured, though from causes inherent in the goods themselves. *Pittsburg, Cincinnati, & St. Louis Railway Co. v. Morton*, 61 Ind. 539. Goods ready for shipment at a place where the carrier may receive them, may be tendered for shipment to an agent authorized to receive them, wherever he may be. *Cobb v. Illinois Central Railroad Co.*, 38 Iowa, 601. A railroad company has no right simply by reason of its incorporation to make unreasonable or discriminating charges, and by ac-

cepting a charter forbidding such charges, it is bound thereby to the common-law rule against them. *Chicago & Alton Railroad Co. v. People*, 67 Ill. 11. Such companies being designed mainly for public accommodation, are subject to legislative control, and may be forbidden to make unjust discriminations. *Louisville & Nashville Railroad Co. v. East Tennessee, Virginia, & Georgia Railroad Co.*, 16 Am. & Eng. Railw. Cas 1; *Atchison, Topeka, & Santa Fe Railway Co. v. Denver & New Orleans Railroad Co.*, 110 U. S. 667. As to where the power to regulate resides, — whether in the legislatures of the states, or in Congress, see *infra*, § 283 b.

bound to perform, upon payment, even though entitled to demand payment in advance, a refusal to perform the act excuses any tender of the compensation. All that is necessary to be averred or proved in such case is a willingness and readiness to pay when the other party is entitled to demand pay, which, in the case of the carrier, is not till he accept the goods and assume the duty of his office.⁴ When according to the common course of business, carriers do not require pay in advance, freight is not expected to be so paid, unless required, and the omission will not excuse the carrier, in such cases. Indeed, in one case it was held that the carrier could not rid himself of his common-law liability by waiving compensation, where the right to demand it existed.⁵ But where freight is actually paid in advance, it would seem that the last carrier should not be allowed to insist upon any charge beyond the amount paid. But where a less sum than the regular tariff is paid, and the last carrier is required to advance for former freight a sum, which, together with his own, exceeds that which had been paid, it was held he might demand the balance before surrendering the goods.⁶

18 Ill. 488. Where payment has been made in advance, it cannot be required to be paid over again to another party, who has carried the goods without authority. But where payment is not made in advance to the first carrier, and he employs a second, the latter has a lien on the goods for his charges. *Nordmeyer v. Loescher*, 1 Hilton, 499. It is said in *Skinner v. Chicago & Rock Island Railroad Co.*, 12 Iowa, 191, that a railway company has the right to require a receipt of the consignee, showing that the goods were in good order when delivered, and that the consignee has an equal right to examine the goods before executing the receipt, and that such examination should be made at the place of delivery and before removal. But the ordinary receipt on the books of the express company required by the agent at the very moment of delivery, without giving any opportunity for inspection, could create no implication against the owner as to a subsequent claim for damages by reason of the default of the company.

⁴ *Rawson v. Johnson*, 1 East, 203; 2 Kent Com. 598, 599, and note.

⁵ *Knox v. Rives*, 14 Ala. 249, 261, opinion of court, by CHILTON, J.

⁶ *Wells v. Thomas*, 27 Mo. 17. And where there was a special contract made by the owner of the goods with the first carrier in an extended line of transportation, that the entire freight to the place of destination should not exceed a certain sum, there being no particular business connection between the different companies, and each company after the first having charged and received from the next succeeding one its usual rate of freight, thus more than exhausting the sum for which the first company stipulated, it was held that the last company was justified in detaining the goods until paid its usual rate

3. It is said that payment of fare will be presumed to have been made according to the common course of business upon the route.⁷ And although this has been questioned,⁸ it is certain that such an inference, as matter of fact, might be very obvious, in the case of passengers upon railway trains, under some circumstances, and we do not perceive any reasonable objection to the rule as one of presumption of fact, which for its force must depend upon circumstances, to be judged of by the jury. But it could scarcely apply with much force in the first instance in the case of freight, which, not being due until the delivery of the goods at the end of the transit, would not be presumed to have been paid until that event occurred. After that, the presumption of the payment of freight might be of the same force as that in regard to the payment of fare by passengers.

4. As before stated, a carrier is not bound to receive goods which he is not accustomed to carry, (b) or when his means of conveyance * are all employed, or before he is ready to depart,⁹ or where the property is publicly exposed to the depredations of the mob,¹⁰ or where the goods are not safe to be carried.¹¹ So, too,

of freight, together with the sum advanced to the other companies. *Schneider v. Evans*, 9 Am. Law Reg. n. s. 536; s. c. 25 Wis. 241. But see *infra*, § 188, pl. 2, and cases cited in notes. See also the note to *Schneider v. Evans*, 9 Am. Law Reg. n. s. 540, 541, where the justice of the rule adopted by the court is doubted.

⁷ *McGill v. Rowand*, 3 Penn. St. 451.

⁸ 2 Parsons Cont. 174, 5th ed., *supra*, § 171, pl. 4, as to presumptive evidence.

⁹ *Arguendo*, in *Lane v. Cotton*, 1 Ld. Raym. 652; *Morse v. Slue*, 1 Vent. 190. But if he do accept the delivery, he is liable as a common carrier. *Barclay v. Cuculla Y Gana*, 3 Doug. 389; *Wibert v. New York & Erie Railway Co.*, 19 Barb. 36; *Hannibal Railroad Co. v. Swift*, 12 Wal. 262.

¹⁰ *Edwards v. Sheratt*, 1 East, 604. And it was held erroneous to instruct the jury, that press of freight will not in ordinary times excuse the carrier, a railway company, from carrying freight forward without delay, where such press had existed for a long time, and was not notified to the consignee. *Peet v. Chicago & Northwestern Railway Co.*, 20 Wis. 594.

¹¹ Statute 8 & 9 Vict. c. 20, § 105. See also *Story Bailm.* § 328; 2 Kent Com. 599; *Hodges Railw.* 613; *Angell Car.* § 125.

(b) Thus, a carrier who does not only on his special contract. *Honeyman v. Oregon & California Railroad Co.*, 25 Am. & Eng. Railw. Cas. 380. assume to be a carrier of dogs, is not liable as such, though he takes a dog to carry for pay. He will be liable

the carrier may excuse himself by showing that the loss happened through the fraud or negligence of the owner of the goods in packing or otherwise, or from internal defect, without his fault.¹² So, where one who was bailee of goods to book them with the defendants, stage proprietors and common carriers of parcels, to carry to London, instead of doing so, put them in his own bag, which the defendants lost, it was held he could not recover the value of the parcel.¹³ So, too, if the loss happen partly through the negligence of the owner, and partly through that of the carrier, he is not liable unless, perhaps, where the owner's negligence is not the proximate cause of the loss.¹⁴ The carrier cannot refuse to carry a parcel because the owner refuses to disclose the contents. * If accustomed to carry parcels, a carrier is bound to carry packed parcels (which is a bundle made up of smaller ones), according to the terms of the English statute.¹⁵ (c)

¹² 2 Greenl. Ev. 214; *Leech v. Baldwin*, 5 Watts, 446. In *Coxe v. Heisley*, 19 Penn. St. 243, the owner represented the goods to be of much less value than they were, and thereby induced the carrier to exercise less watchfulness in regard to them. *Relf v. Rapp*, 3 Watts & S. 21, is a similar case where a box of jewelry was put in an ordinary box and marked as glass, and the court held the misrepresentation such a fraud as to excuse the carrier from his common-law liability, even in the case of embezzlement by his servants.

But where goods are directed to be carried in a particular manner or position the carrier is bound to regard the direction, and is liable for all damage resulting from his neglect to do so. *Sager v. Portsmouth Railroad Co.*, 31 Me. 228. As, where a box containing a bottle of oil of cloves was marked "Glass with care—this side up,"—and was lost by disregarding the direction, it was held, this was a sufficient notice of the value and of the contents. *Hastings v. Pepper*, 11 Pick. 41; *infra*, § 186.

¹³ *Miles v. Cattle*, 6 Bing. 743.

¹⁴ *Davies v. Mann*, 10 M. & W. 546; *Robinson v. Cone*, 22 Vt. 213, and cases referred to in the opinion of the court.

¹⁵ *Crouch v. Great Northern Railway Co.*, 9 Exch. 556; s. c. 25 Eng. L. & Eq. 449. By statute 13 & 14 Vict. c. 61, § 14, it is provided that railway companies may make such charges as they may think fit, on small parcels not exceeding a certain weight, provided packed parcels forming an aggregate of more than that weight shall not come under this provision, but only single parcels in separate packages. Under this and similar statutes it has been held, that if the packages are separate enclosures, although sent upon the same train and of the same kind enough to exceed the statute weight, they may still be charged as parcels at any rate the companies may fix, which shall

(c) A contract which gives certain illegal and cannot be enforced. Messengers an exclusive advantage is *senger v. Pennsylvania Railroad Co.*,

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* 5. Where goods differ, in some essential particulars, from the general character of advertised freight, and are usually subjected to a specific rate, the carrier will be entitled to so charge.¹⁶

be uniform to all. *Parker v. Great Western Railway Co.*, 6 Ellis & B. 77; s. c. 34 Eng. L. & Eq. 301. By the English Statutes, which limit the tonnage rates for railway transportation according to distance, and require that rates be uniform to all, the company may still charge something reasonable in addition, for loading and unloading the goods, when they perform that service. *Parker v. Great Western Railway Co.*, *supra*. And in the same case it is held that the company may make a reasonable allowance to persons or companies for collection and delivery of goods at stations or to consignees, when that is part of their undertaking, without infringing the statute requiring uniformity of rates of charges. This subject is somewhat elaborately discussed by the Court of Exchequer, in *Crouch v. Great Northern Railway Co.*, 9 Exch. 556; s. c. 34 Eng. L. & Eq. 573, and the cases bearing on the point extensively referred to. The only point really decided there is, that it is a question of fact, whether one kind of goods or one kind of package is attended with more risk to the carrier than another. The question was between packed parcels, the mass being addressed to one person, and the separate parcels intended for different persons, and "Enclosures" containing several parcels for the same person. The jury found there was no substantial difference in the risk. See also *infra*, § 191, and *Pickford v. Grand Junction Railway Co.*, 10 M. & W. 399; *Parker v. Great Western Railway Co.*, 11 C. B. 545, and 8 Eng. L. &

¹⁶ *Lamar v. New York & Savannah Steamship Navigation Co.*, 16 Ga. 558. But under the English statute the carrier can make no discrimination with reference to the person or business of the owner or the mode of conducting it. *Great Western Railway Co. v. Sutton*, Law Rep. 4 H. L. 226.

37 N. J. Law, 531. Thus an agreement to carry for certain persons at a rate less than is charged to others under the same conditions, is illegal. *Same v. Same*, 36 N. J. Law, 407. And so is a discrimination based on the amount of freight shipped. It is a discrimination favorable to capital and against public policy. *Hays v. Pennsylvania Railroad Co.*, 12 Fed. Rep. 309; *Scofield v. Lake Shore & Michigan Southern Railroad Co.*, 23 Am. & Eng. Railw. Cas. 612. Nor is it a good consideration for a less rate that the shipper is a customer of the company in goods of another kind. *Belladyke Coal Co. v. North British*

Railway Co., 2 Nev. & McN. 105. And see *McCoy v. Cincinnati Railroad Co.*, 13 Fed. Rep. 3; *Diphwys Casson Slate Co. v. Festiniog Railway Co.*, 2 Nev. & McN. 73. But see *Johnson v. Pensacola & Perdido Railroad Co.*, 16 Fla. 623. The matter of discriminating charges as affecting interstate transportation is now regulated by the interstate commerce act of February 4, 1887. See *infra*, § 233 b. Discrimination in rates against non-competing points cannot be justified on the ground that rates to competing points, in so far as they are lower, are unreasonably low. *Chicago & Alton Railroad Co. v. People*, 67 Ill. 11.

* 6. A railway company is bound to receive and carry freight in the order in which it is offered at the particular station, and not

Eq. 426; *Edwards v. Great Western Railway Co.*, 11 C. B. 588; 8 Eng. L. & Eq. 447. An opinion is here intimated in *Crouch v. Great Northern Railway Co.*, that an express carrier, or collector and carrier of parcels, may recover special damage of a railway company which, by failure to perform its duty promptly, injures his business. And *Hadley v. Baxendale*, 9 Exch. 341; s. c. 26 Eng. L. & Eq. 398, is cited in support of the proposition. The rule in regard to special damages is correctly defined in *Hadley v. Baxendale*, so far as carriers are concerned. It is there held that, if the carrier is aware of the circumstances of the employer and the extent of the injury likely to occur by delay, and is still culpable, thereby causing delay, he must make good the special damage. But if he is not aware of any unusual circumstances whereby special damages are likely to occur, he is only liable for such general damages as may be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. As, where a miller sent a shaft to be used as a model for casting a new one, and the carrier unreasonably delayed the delivery of it, and consequently the return of the new one, and the plaintiff's mill, in the mean time, remained idle in consequence, none of these circumstances being known to the carrier, it was held that the plaintiff could not recover special damage by reason of his mill remaining idle; and that it was the duty of the judge, in trying the case, to lay down a definite rule by which the jury might estimate the damages; and to enable the judge to do so the full court should determine that rule. *Blake v. Midland Railway Co.*, 18 Q. B. 93; 10 Eng. L. & Eq. 437; *Alder v. Keighley*, 15 M. & W. 117; *infra*, § 189, note 2; § 191, pl. 4, 5, and note 10.

In an important case in the House of Lords, *Finnie v. Glasgow & South-western Railway Co.*, 2 Macq. Ap. Cas. 177; s. c. 34 Eng. L. & Eq. 11, the subject of inequality of railway charges for freight, is learnedly discussed by Lord Chancellor CRANWORTH and Lord St. LEONARDS, two of the most learned and experienced lawyers in England, and the surprising diversity of opinion between them on a subject which seems not very difficult of solution, is another proof, if any were required, of the necessity of continued discussion to settle the application of the most familiar principles of the law. In this case, the defendants leased a branch line on which the plaintiff, a coal-owner, resided. The statute provided, that the rates should be made equal to all persons, and that no reduction or advance should be made, for or against any person. The rates of charge were higher on the branch than upon the main line, for the same distance. When the plaintiff sent his coals along the branch, he was charged the branch rates; but when they reached the main line, then at the main-line rates. When coal-owners, living on the main line, sent their coals from the main line on to the branch, they were charged for the whole distance on both lines, the main-line rates. It was held, these two judges differing as already stated, that this was no violation of the equal-rates clause in the statute, though Lord St. LEONARDS thought it was. It was doubted by the House, and by Lord Chancellor CRANWORTH, whether, when

* with reference to all the stations on the road; and the rolling stock should be distributed to the several stations with reference

one was overcharged in violation of that clause, the money could be recovered back by the party so overcharged. But Lord St. LEONARDS was clearly of opinion that it might be. If it were not for the doubt and the difference of opinion here, and the decision, one could entertain no serious question of the entire soundness of the opinions expressed by Lord St. LEONARDS.

A railway company cannot discriminate in its rates between goods carried partly by water and partly by railway and those carried exclusively by railway. *Ransome v. Eastern Counties Railway Co.*, 1 C. B. N. s. 437; s. c. 4 C. B. N. s. 135. But it was said in this case, which is also reported in 38 Eng. L. & Eq. 232, that in determining whether a railway company has given undue preference to a particular person, the court may look at the fair interests of the company itself, and entertain such questions, as whether the company might not carry larger quantities, or for longer distances, at lower rates per ton, per mile, than smaller quantities, or for shorter distances, so as to derive equal profits to itself. This latter principle is reaffirmed in *Ransome v. Eastern Counties Railway*, 31 Law T. 72, on appeal. And a railway company which advertised for carrying a certain description of goods at a lower rate of charge, when sent through certain agents, was restrained by injunction from making any such discrimination. *Baxendale v. North Devon Railway Co.*, 3 C. B. N. s. 324. Nor can the railway companies, under the English statutes prohibiting undue preferences, so arrange their tariff in regard to certain commodities as to annihilate the effect of distance of transportation with dealers in those commodities in different localities. *Ransome v. Eastern Counties Railway Co.*, 4 C. B. N. s. 135.

And where the proprietor of coal mines was about to construct a railway for the accommodation of the lessees, and abandoned the purpose on the public railway entering into an agreement to carry the coal from his pits at a reduced rate of charge from what others were required to pay from the same station for the same route, it was held to be an undue preference. *In re Harris*, 3 C. B. N. s. 693. But a railway company is justified in carrying goods at a less rate of charge for one person than that at which it carries the same description of goods for another, if there are circumstances which render the cost to the company less. *Oxlade v. Northeastern Railway Co.*, 40 Eng. L. & Eq. 234; s. c. 1 C. B. N. s. 454. But a railway company cannot demand the statutory toll and something more for services performed, accommodation afforded, and expenses and risk incurred in and about the receiving, loading, and unloading, and delivering the goods, — that being a part of the consideration of the toll. *Pegler v. Monmouthshire Railway & Canal Co.*, 6 H. & N. 644. Nor can the company charge, in addition to the regular transport of the goods, for collecting or delivering the goods when such services are not performed; and such charges, if paid under protest, may be recovered. *Garton v. Bristol & Exeter Railway Co.*, 1 Ellis, B. & S. 112; s. c. 7 Jur. N. s. 1234. The subject of excessive charges for packed parcels is here presented and discussed in various forms, and the excess of legal charge held recoverable of the company. See also

* to the amount of business done at each.¹⁷ (d) The refusal of a common carrier to carry for a particular consignee is a breach of duty towards the consignor, and he should bring the action.¹⁸

In re Baxendale, 11 C. B. N. s. 787; *Baxendale v. West Midland Railway Co.*, 8 Jur. N. s. 1072; s. c. 3 Gif. 650; *Same v. Great Western Railway Co.*, 14 C. B. N. s. 1. See 2 Jur. N. s. 1174; 12 C. B. N. s. 758; *Baxendale v. Great Western Railway Co.*, 10 Jur. N. s. 496; 16 C. B. N. s. 137; *Piddington v. South Eastern Railway Co.*, 5 C. B. N. s. 309, 336.

But in *Baxendale v. Eastern Counties Railway Co.*, 4 C. B. N. s. 63, it was held, that a railway company was not bound to carry parcels directed to different persons, but delivered to it at the same time, and all to be redelivered to the same person, at the place of destination, at the same rate as if directed to one person only. Although carriers are limited to a reasonable charge, they are under no common-law obligation to charge equal rates of carriage to all customers. *Ib.* Nor does the statute apply where the carriage is from a point out of England to a point within, being partly by steamboat and partly by railway. *Branly v. Southeastern Railway Co.*, 12 C. B. N. s. 63; s. c. 9 Jur. N. s. 329.

Railway companies may discriminate by classes, in regard to freight or passengers, but their charges must be uniform to all persons. They may, however, change their rates from time to time. *Chicago, Burlington, & Quincy Railroad Co. v. Parks*, 18 Ill. 460. And a railway company is not bound to issue season tickets at equal prices over equal distances on its route. *Jones v. Eastern Counties Railway Co.*, 16 C. B. N. s. 718.

But where the company has been accustomed to unload goods, and place them on the wagons of the carriers to whom they are consigned, without additional charge, but discontinues the practice as to all but one carrier to whom a comparatively small quantity comes, the court, under Lord CAMPBELL's act, cannot require an extension of the same favor to other carriers. The court here said, however, in giving judgment, that the plaintiff was not without just ground of complaint in regard to the greater facilities afforded other carriers. *Cooper v. London & Southwestern Railway Co.*, 4 C. B. N. s. 738.

It is not competent for a railway company in England, under the English Railway Traffic Act, to carry for one person at a rate below the ordinary charge, because that person will, on that account, stipulate to employ the company in other transportation wholly distinct and independent. And the courts may enjoin any such preference, although it may be granted for an

¹⁷ *Ballentine v. Western Missouri Railroad Co.*, 40 Mo. 491. *Infra*, § 183, note 3.

¹⁸ *Lafarge v. Harris*, 13 La. An. 553.

(d) *Houston & Texas Central Railroad Co. v. Smith*, 63 Tex. 322.

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7. It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service.¹⁹ But as the rule is clearly established at common law,²⁰ that a "carrier is bound by law to carry everything which is brought to him for a reasonable sum, to be paid to him for the same carriage, and not to extort what he will," it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own

equivalent advantage by the company. *Baxendale v. Great Western Railway Co.*, 5 C. B. N. s. 309, 336.

But in *Nicholson v. Great Western Railway Co.*, 5 C. B. N. s. 366, it was decided that a railway company might enter into special agreements whereby advantages would be secured to individuals in the carriage of goods, where it is clear that in entering into such agreements the company has only the interests of the proprietors and the legitimate increase of the profits of the company in view, that the consideration for such advantage is adequate, and that the company is willing to afford the same facilities to all others on the same terms. And this may consist in a guaranty of large quantities and full train loads, at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guaranty. The company has no right, as already stated, to impose on a customer a charge for conveying goods to and from the station if he does not require such service to be performed by them. *Garton v. Bristol & Exeter Railway Co.*, 6 C. B. N. s. 639. And it is an undue preference to allow one carrier to the railway to unload his goods regularly at a later hour in the day than the station is open to other carriers, or to fix a uniform rate for the transportation of different classes of freight below the average of the customer's business, it not appearing that this diminished charge was justified by any special circumstances of advantage to the company, independent of special favor to this party. *Ib.*

The omission by a railway company of a public duty, e. g., not keeping the water of such depth about its dock as to allow the approach of ships, although done to gain a business advantage over ship transportation, is not a matter to be redressed by injunction under the Railway Traffic Act, it being subject to redress by mandamus or indictment. *Bennett v. Manchester, Sheffield, & Lincoln Railway Co.*, 6 C. B. N. s. 755.

The doctrine of the case of *Nicholson v. Great Western Railway Co.*, *supra*, is reaffirmed in 7 C. B. N. s. 707.

¹⁹ *Fitchburg Railroad Co. v. Gage*, 12 Gray, 393; *supra*, note 15, p. 98.

²⁰ *LAWRENCE, J.*, in *Harris v. Packwood*, 3 Taunt. 264.

customers at will by the arbitrary discrimination in his prices. Hence it was held, at an early day, that all which could be required on the part of the owner of the goods by way of compensation was, that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required.²¹ Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable, either absolutely or relatively.

*SECTION XI.

Limitation of Liability by Notice or Contract.

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| <ol style="list-style-type: none"> 1. Special contract limiting liability, valid. 2. Notice, assented to by owner, has same effect. 3. But as matter of evidence, it is received with caution. 4. Carrier must show that owner acquiesced in notice. 5. Limitation under the English Carriers' Act. 6. New York courts at one time held, that express contract would not excuse the carrier. 7. American cases generally hold notice, assented to, binding. | <ol style="list-style-type: none"> 8. Knowledge of general notice not sufficient. 9. Carrier cannot exempt himself from liability for negligence. 10. Rule established in Pennsylvania same as the English. 11. General result of all the cases. 12. Rule under the English statute stated and illustrated. 13. Different modes in which the carrier may waive notice. 14. Notice of one kind will not excuse from responsibility of another. |
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§ 177. 1. The effect of special or general notices in restricting the general liability of carriers, is one of vast importance, and has created a great deal of discussion. We should scarcely be expected to go into the full detail of the whole subject, but we shall state the points established by the better-considered cases upon the subject. It was never made a serious question, in the English law, since the case of *Southcote*,¹ that any bailee might stipulate for an increased or a diminished degree of responsibility from that which the law imposed upon his general undertaking. (a)

²¹ *Supra*, note 3; *infra*, § 188, pl. 33 *et seq.*, and notes.

¹ 4 Co. 83.

(a) And it seems now to be the admitted doctrine in this country as the carrier may, by express contract, limit his common-law liability. *Rintoul v. New York Central & Hudson*

2. And upon principle, it is difficult to distinguish between an express contract, exonerating the carrier from his ordinary responsibility, and a notice from the carrier that he would not assume such responsibility, brought home and assented to by the owner of goods delivered to be carried. For as the carrier may refuse to carry, and thus subject himself to an action for damages, he may equally, it would seem, undertake to carry upon such terms as his employers are willing to negotiate for, so that, upon principle, a notice brought home to the owner of the goods and assented to is neither more nor less than a special contract. (b)

River Railroad Co., 17 Fed. Rep. 905; *Earnest v. Express Co.*, 1 Woods, 578; *Taylor v. Little Rock, Mississippi River, & Texas Railroad Co.*, 39 Ark. 148; *Brown v. Adams Express Co.*, 15 W. Va. 812; *Capehart v. Seaboard & Roanoke Railroad Co.*, 81 N. C. 438; *Louisville & Nashville Railroad Co. v. Brownlee*, 14 Bush, 590, *Pennsylvania Railroad Co. v. Fries*, 87 Penn. St. 234; *Mobile & Ohio Railroad Co. v. Weiner*, 49 Miss. 725. But see *Piedmont Manufacturing Co. v. Columbia & Greenville Railroad Co.*, 19 S. C. 353; *Talbott v. Merchants' Despatch Co.*, 41 Iowa, 247. And it has been held also that a contract made with the consignor will bind the consignee. *Nelson v. Hudson River Railroad Co.*, 48 N. Y. 498. This, however, does not permit a contract giving the carrier immunity from his own negligence. *Ib.*; *Georgia Railroad Co. v. Gann*, 68 Ga. 350; *Erie Railway Co. v. Lockwood*, 28 Ohio St. 358; *Cream City Railroad Co. v. Chicago, Milwaukee, & St. Paul Railway Co.*, 21 Am. & Eng. Railw. Cas. 70; *Little Rock, Mississippi River, & Texas Railroad Co. v. Harper*, 44 Ark. 208; *Chicago, St. Louis, & New Orleans Railroad Co. v. Abels*, 60 Miss. 1017; *Ball v. Wabash, St. Louis, & Pacific Railroad Co.*, 83 Mo. 574. But see *Griswold v. New York & New England Rail-*

road Co., 26 Am. & Eng. Railw. Cas. 280. Thus the carrier cannot limit his liability to loss caused by gross negligence. *Shriver v. Sioux City & St. Paul Railway Co.*, 24 Minn. 506. Nor can he exempt himself from loss arising from a particular risk, like fire. If the loss occurs through his negligence he will be liable notwithstanding. *Scruggs v. Baltimore & Ohio Railroad Co.*, 18 Fed. Rep. 818; *Little Rock, Mississippi River, & Texas Railroad Co. v. Corcoran*, 40 Ark. 375. But he may limit his liability to a certain agreed valuation, though the loss beyond the limit is the result of his negligence. *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331. But see *contra*, *Rosenfeld v. Peoria, Decatur, & Evansville Railway Co.*, 21 Am. & Eng. Railw. Cas. 87. In England it seems that it will make no difference that carriage is undertaken at a reduced rate in consideration of the agreement. The company will still be liable for negligence. *D'Arc v. London & North-western Railway Co.*, Law Rep. 9 C. P. 325. And see *Grand Trunk Railway Co. v. Fitzgerald*, 5 Can. Sup. Ct. 204. But see *Lewis v. Great Western Railway Co.*, Law Rep. 8 Q. B. 195. See also *Manchester, Sheffield, & Lincolnshire Railway Co.*, Law Rep. 8 Ap. Cas. 703.

(b) A general notice, though brought

3. But a notice, brought home to the owner of the goods as evidence, merits a very different consideration, in this species of bailment, from any other, where there is no obligation upon the bailee to assume the duty. In the case of a carrier, with whom it is not optional altogether whether to carry goods offered or not, * but where he must carry such goods as he is accustomed to carry, upon the general terms of liability imposed by the law, or submit to an action for damages, and where every one desiring goods carried has the option to have them carried without restriction of the carrier's duty, unless he choose to waive some portion of his legal rights, for present convenience or ultimate peace; the mere fact of such a notice, restricting the carrier's liability, being brought home to the knowledge of the owner of goods, before or at the time of depositing them with the carrier, is no certain ground of inferring whether the carrier consented to recede from his notice and perform the duty which the law imposes upon him, or the owner of the goods consented to waive some portion of his legal rights.

4. Perhaps, upon general grounds of inference, it might be regarded as more logical and more reasonable to infer, that the carrier receded from an illegal pretension, than the owner of the goods from a legal one. At all events, to exonerate the carrier from his general liability, he must show, at the least, it would seem, that the owner assented to the demands of the notice, or acquiesced in it, by making no remonstrance.

5. It will be found that the decided cases mainly coincide with these general propositions.² The English statute, the Carriers'

² *Nicholson v. Willan*, 5 East, 507, is one of the earliest cases, where the mere fact of notice is treated as equivalent to an express contract, and this is on the presumption that it was assented to by the owner of the goods, who seems to have been present when the goods were deposited, and to have been aware of the notice. Nothing is said of any remonstrance on his part. This notice, it will be observed, is only that packages above the value of £5 must be disclosed and insured as such. This notice seems nothing more than a regulation of business to enable the carrier to know the value of parcels, and

home to the shipper, will not avail the carrier. *Mobile & Ohio Railroad Co. v. Weiner*, 49 Miss. 725; *Brown v. Adams Express Co.*, 15 W. Va. 812. The shipper must be shown to have assented. *Erie Railway Co. v. Wilcox*, 84 Ill. 239. But a clause in a receipt, if understandingly assented to by the shipper, will bind him, though he does not sign it. *Boscowitz v. Adams Express Co.*, 93 Ill. 523.

* Act,³ requires the owner of goods of great value in small compass, enumerated in the act, which is very extensive, to declare to the carrier at the time of delivery the contents of the parcels, and pay the requisite price, or the carrier is exonerated from liability.

6. In the State of New York the courts at one time held, that it was not competent for carriers to exonerate themselves from their general liability, either by notices brought home to the owner of goods, at the time they are deposited for carriage, or by express contracts to that effect even.⁴

to demand pay accordingly, which all carriers may now do, by statute in England, and in this country by general usage. See also *Reynold v. Waterhouse*, 1 M. & S. 225; *Catley v. Wintringham*, Peake, 150; *Cobden v. Bolton*, 2 Camp. 108.

In *Riley v. Horne*, 5 Bing. 217, BEST, C. J., shows, very conclusively, the reasonableness and justice of allowing carriers, by general notices, to require of those who bring goods or parcels to disclose the contents, and to demand pay in proportion to their value, by way of insurance. *Wyld v. Pickford*, 8 M. & W. 443, seems to decide the same. And it seems especially reasonable that where the owner of the goods, being aware of the notice of the carrier that he will charge a higher price for valuable goods, does not disclose the value, in order to save expense, he should have no claim for any loss without the fault of the carrier. *Clay v. Willan*, 1 H. Bl. 298; *Izett v. Mountain*, 4 East, 370. See also *Gordon v. Ward*, 16 Mich. 360. The carrier is justified in dealing with the consignor and his agents as empowered to bind all parties interested in the transportation. *McMillan v. Michigan Southern & Northern Indiana Railroad Co.*, 16 Mich. 79.

³ Statute 11 Geo. IV. & 1 Wm. IV. c. 68.

⁴ *Cole v. Goodwin*, 19 Wend. 251; s. c. 2 Redf. Am. Railw. Cas. 110; *Hollister v. Nowlen*, 19 Wend. 234; s. c. 2 Redf. Am. Railw. Cas. 96; *Gould v. Hill*, 2 Hill, 623. But see also *Fish v. Chapman*, 2 Kelly, 349; *Jones v. Voorhees*, 10 Ohio, 145; *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. 491. The New York courts seem to have adhered to the case of *Hollister v. Nowlen*. *Camden & Amboy Railroad Co. v. Belknap*, 21 Wend. 354; *Clark v. Faxton*, 21 Wend. 153; *Alexander v. Greene*, 2 Hill, 9; 7 Hill, 533; *Powell v. Myers*, 26 Wend. 594; s. c. 2 Redf. Am. Railw. Cas. 227. But *Gould v. Hill*, in which it was held that the carrier could not exonerate himself from his common-law responsibility, by a special contract, has been deliberately disregarded in two cases: *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Barb. 524. And in *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225, it was held that if the carrier may limit the extent of his responsibility by express contract, he cannot by mere notice. In the *Western Transportation Co. v. New Hall*, 24 Ill. 466, it was held, that carriers cannot restrict their common-law responsibility by notice brought home to the owner of the goods, unless the same is assented to in express terms by such owner; and

*7. But most of the American cases admit that carriers may restrict their general liability, by notices brought home to the

when any risks are excepted in the bill of lading, it is incumbent on the carrier to prove that the loss resulted from such risks. And in *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. 487, 491, in the Court of Appeals, PARKER, J., says: "I am not aware that *Gould v. Hill* has been followed in any reported case." In *Wells v. Steam Navigation Co.*, 2 Comst. 209, BRONSON, J., who seems to have concurred in the decision of *Gould v. Hill*, says: "It is a doubtful question." And PARKER, J., in *Dorr v. New Jersey Steam Navigation Co.*, *supra*, says: "That a carrier may, by express contract, restrict his common-law liability, is now, I think, a well-established rule of law." The Superior Court of the city of New York adopted a similar view in the same case, 4 Sandf. 136; and in *Stoddard v. Long Island Railroad Co.*, 5 Sandf. 180. So also in *Edwards v. Cahawba*, 14 La. An. 224; *Falvey v. Northern Transportation Co.*, 15 Wis. 129.

The following cases also hold the same doctrine: *Swindler v. Hilliard*, 2 Rich. 286; *Camden & Amboy Railroad Co. v. Baldauf*, 16 Penn. St. 67; *Reno v. Hogan*, 12 B. Monr. 63; *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186; s. c. 2 Redf. Am. Railw. Cas. 52; *Barney v. Prentiss*, 4 Har. & J. 817.

As the result of all the cases on the subject, and upon true policy and sound principle, it must be admitted that a carrier may relieve himself from his duty to insure the safe arrival of the goods at their destination by a special contract to that effect, or what is equivalent; and a special notice to that effect brought home to the mind of the owner of the goods at the time of delivery, or before, and no objection made to it, will have the force of a special contract according to the English cases; but, according to many of the American cases, some further evidence of assent on the part of the owner is requisite. Opinion of ISHAM, J., in *Kimball v. Rutland & Burlington Railroad Co.*, 26 Vt. 247. If a different rate of charge is made, the election of the lower rate is an assent to the notice.

The language of NELSON, J., in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; s. c. 2 Redf. Am. Railw. Cas. 34, is a fair exposition of the American law.

A notice restricting the carrier's liability for baggage, "printed on the back of the passage ticket, and detached from what ordinarily contains all that it is material for the passenger to know, does not raise a legal presumption that the party had knowledge of the notice before the train left. That is a question for the jury." *Brown v. Eastern Railroad Co.*, 11 Cush. 97. In *State v. Townsend*, 37 Ala. 247, it was held that a common carrier cannot limit his common-law liability by any general notice, but may do so by special contract with the shipper. And a bill of lading, given by the carrier on receipt of the goods, and accepted by the shipper, is a special contract within the meaning of the rule. But such special contract cannot be considered as exempting the carrier from responsibility for any loss occurring from his own negligence. A bill of lading, however, exempting the company from all

* knowledge of the owner of the goods, before or at the time of delivery to the carrier, if assented to by the owner; which is but another form of defining an express contract, which seems to be everywhere recognized as binding upon those contracting with carriers, unless New York may form an exception.⁵ (c)

8. But it was held that the owner of goods delivered at the station-house of the railway, to be carried from Dover, N. H., to Boston, and which were consumed by an accidental fire, at the former place, was not precluded from recovery of the value of the goods by a general notice of the company, known to the plaintiff at the time of the delivery of his goods, that all goods would be at the risk of the owners while in the defendants' warehouse.⁶ (d)

9. And in another case it was held, that a paper exonerating the company from all liability to the plaintiff for damage which might happen to any horses, oxen, or other animals he might send by their railway, did not exonerate them from liability for negligence.⁷ (e)

responsibility, except for wilful negligence or fraud, on account of the freight being reduced, has been held a valid contract. *Lee v. Marsh*, 43 Barb. 102. Common carrier cannot stipulate for exemption from responsibility for negligence, either of himself or his servants. *Ashmore v. Pennsylvania Steam Towing & Transportation Co.*, 4 Dutcher, 180.

⁵ *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; s. c. 2 Redf. Am. Railw. Cas. 34; *Sager v. Portsmouth Railroad Co.*, 31 Me. 228; s. c. 2 Redf. Am. Railw. Cas. 263; *Bean v. Green*, 3 Fairf. 422; *Cooper v. Berry*, 21 Ga. 526.

⁶ *Moses v. Boston & Maine Railroad Co.*, 4 Fost. N. H. 71; *supra*, § 174, note 11.

⁷ *Sager v. Portsmouth Railroad Co.*, 31 Me. 228. See also *Mann v. Birchard*, 40 Vt. 326; *Illinois Central Railroad Co. v. Waters*, 41 Ill. 73. But where the owner or his agent accompanies the animals in the transportation, and stipulates for reduced freight in consideration of assuming the risk, the contract will be enforced unless there is proof of negligence by defendants not known to the other party. *Squire v. New York Central Railroad Co.*, 98 Mass. 239. But the stipulation of exemption from responsibility on the part of the carrier will not be extended beyond the very terms of the contract. *Hawkins v. Great Western Railroad Co.*, 17 Mich. 57. See *Purcell v. Southern Express Co.*, 34 Ga. 315. A contract restricting the responsibility of the carrier must be reasonable in itself, and not calculated to ensnare or defraud the other party. A contract requiring notice of losses in thirty

(c) See *supra*, note (b).

(d) See *supra*, note (b).

(e) The rules relative to limitation of liability for injury, &c., to live

10. In Pennsylvania, the rule of the English law, that a carrier * may restrict his liability, by a special acceptance, seems to be firmly established, notwithstanding some misgivings expressed by the courts in regard to the good policy of such a rule. The more prominent cases upon the subject are referred to in the opinion of the court, in *Dorr v. New Jersey Steam Navigation Co.*⁸ The burden of proving any qualification of the common-law responsibility of the carrier rests upon him. The notice, to be of any force,

days is not reasonable. *Adams Express Co. v. Reagan*, 29 Ind. 21; *Southern Express Co. v. Caperton*, 44 Ala. 101. But it should be held reasonable unless the time is too short. A contract excusing the carrier from loss by ordinary negligence is void as against public policy. *Indianapolis, Pittsburg, & Cleveland Railroad Co. v. Allen*, 31 Ind. 394. So in a contract for carrying cattle on a railway, if the carrier leave the cars containing the animals on a side track for two days without food or drink, whereby some die and others are injured, he is responsible, although the carrier agreed to bear all the risks of transportation; this being not among such risks, but arising from an utter abandonment of his duty by the carrier. *Keeney v. Grand Junction Railroad Co.*, 47 N. Y. 525; s. c. 59 Barb. 104. A contract made by the first carrier in a line, excepting certain risks, as the "unavoidable accidents of the railways and fire in depots," will extend to all the successive carriers. *Maghee v. Camden & Amboy Railroad Co.*, 45 N. Y. 514; *Pemberton Co. v. New York Central Railroad Co.*, 104 Mass. 144.

* 11 N. Y. 485, 491; s. c. 2 Redf. Am. Railw. Cas. 227; *Atwood v. Reliance Co.*, 9 Watts, 87; *Bingham v. Rogers*, 6 Watts & S. 495; *Laing v. Colder*, 8 Penn. St. 479.

stock, seem to be the same that prevail in case of the shipment of merchandise, as stated *supra*, notes (a), (b). Thus though the carrier may contract for exemption, he cannot so relieve himself from the consequences of negligence or positive misconduct, as that would be contrary to public policy. *Railroad Co. v. Pratt*, 22 Wal. 123; *Mynard v. Syracuse, Binghamton, & New York Railroad Co.*, 71 N. Y. 180; *Moulton v. St. Paul, Minneapolis, & Manitoba Railway Co.*, 12 Am. & Eng. Railw. Cas. 13. *South & North Alabama Railroad Co. v. Henlein*, 56 Ala. 368; *Wabash, St. Louis, & Pacific Railway Co. v. Black*, 11 Brad. 465; *Welch v.*

Boston & Albany Railroad Co., 41 Conn. 333. To this point the cases are numerous. The carrier may, it is said, so relieve himself from liability as an insurer. *Maslin v. Baltimore & Ohio Railroad Co.*, 14 W. Va. 180; *Rhodes v. Louisville & Nashville Railroad Co.*, 9 Bush, 688. And he may limit the amount for which in the event of loss he shall be liable. *South & North Alabama Railroad Co. v. Henlein*, 52 Ala. 606; *Harvey v. Terre Haute & Indianapolis Railroad Co.*, 74 Mo. 538; *Chicago, Rock Island, & Pacific Railway Co. v. Harmon*, 12 Brad. 54. But see *contra*, *Chicago, St. Louis, & New Orleans Railroad Co. v. Abels*, 60 Miss. 1017.

must amount to actual notice. And where the general object of a check or ticket is printed in large letters, and the restriction in small ones, it will not be regarded as of much force as evidence of notice. And where the notice is shown to have been acquiesced in, the effect is only to render the carriers responsible as bailees or private carriers for hire.⁹

11. It would seem then to be the result of the decisions everywhere, that carriers may limit their common-law responsibility as insurers, by special contract at the time of acceptance, and that a notice to that effect, brought home to the knowledge of the owner of the goods at the time, or before the delivery of the goods, and assented to by him, or against which he makes no remonstrance, or objection perhaps, will have the same effect in general with such exceptions, limitations, and qualifications as reason and justice may require, to be judged of by the court and jury with reference to the circumstances of each particular case.^{10(f)}

* 12. The English statute ¹¹ in regard to carriers claiming exemption from their common-law responsibility, by reason of

⁹ *Verner v. Sweitzer*, 32 Penn. St. 208. And where the shipper assumes the exclusive charge of goods during the voyage, to excuse the carrier it must appear that the damage occurred from the fault of the shipper. *Roberts v. Riley*, 15 La. An. 103.

¹⁰ Statute 17 & 18 Vict. c. 31, § 7, defines the effect of these notices of carriers in England, which is considered more at length under § 185. An English case on this point, *Simons v. Great Western Railway Co.*, 2 C. B. N. S. 620, holds, that a notice, signed by a person who cannot read, and who is told by the clerk of the company that it is mere form, is not binding as a contract. *Cooper v. Berry*, 21 Ga. 526. Whether the consignor of goods, or the person depositing them with the carrier, has authority to contract, on the part of the consignee, being the owner or party interested in the transportation, for exemption of the carrier from his ordinary responsibility, is, in each case, a question of fact, depending on circumstances, and must be determined by the jury according to what is reasonable and just between the consignee and the carrier. *American Transportation Co. v. Moore*, 7 Am. Law Reg. 352; s. c. 24 How. 1. The questions commonly arising in trials where the carrier claims exemption from his ordinary responsibility, in consequence of special contract or notice, are here discussed by CAMPBELL, J., with thoroughness and ability.

¹¹ Statute 17 & 18 Vict. c. 31, § 7.

(f) See *supra*, notes (a), (b). . For limitation of liability in case of transportation of baggage, see *supra*, § 172.

special notice or contract, requires that it be embodied in a special contract in writing between the company and the owner, or person delivering the goods to the company, that the contract be signed by such owner or person, and that the court or judge shall determine it to be just and reasonable. Under this statute the House of Lords have held, in a somewhat recent case, where the agent of the owner of marble chimney-pieces forwarded them to the company for transportation, and received at the same time notice, that if the company forwarded them as common carriers, it must be done under an insurance, and a reasonable premium paid therefor; and where, after considerable discussion between the agent of the owner and the company, as to the rate of premium to be paid for insurance, he finally gave directions in writing to have the goods forwarded "uninsured," which was accordingly done, and the goods were injured on the journey, that the transaction did not come within the requirements of the statute, not being embodied in any written contract properly signed by the owner or his agent; but that if such had been the fact, the "conditions would have been neither just nor reasonable." Lord CHELMSFORD, with his usual common-sense sagacity and natural instinct in favor of practical convenience, seems to have entertained a different view in regard to the reasonableness and justice of the company requiring an additional premium for insuring the safety of marble chimney-pieces, above what would have been demandable in the case of blocks of marble, or other commodities not specially fragile.¹²

* 13. In regard to the carrier waiving his notice, it has been held not to amount to that, because he had before settled for damages to goods, with the same party, without inquiring into the cause of such damages.¹³ And a railway company who had given notice that they would not be responsible for the luggage of passengers, unless booked and paid for according to their rate of charging the excess above a certain weight, were held responsible for luggage delivered to one of their servants, and not booked and paid for, in the absence of evidence that the company had provided the means of booking.¹⁴ And if the owner declare the

¹² *Peek v. North Staffordshire Railway Co.*, Ellis, B. & E. 958; s. c. 6 Jur. n. s. 370; s. c. 6 W. R. 997, K. B.; s. c. 8 W. R. 364.

¹³ *Evans v. Soule*, 2 M. & S. 1.

¹⁴ *Great Western Railway Co. v. Goodman*, 12 C. B. 313.

nature of the goods, he is not bound to tender the additional charge required by the statutes or rules of the company, until demanded.¹⁵ If a carrier give two notices, he is bound by the one least for his advantage.¹⁶

14. A ticket delivered at the time of receiving live stock for transportation on a railway, stating that the carrier will not be responsible for any injury, while travelling, loading, or unloading, will not excuse him from responsibility in not providing a sufficient carriage.¹⁷

SECTION XII.

Effect of Notice or Contract, limiting Carriers' Liability.

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| <ol style="list-style-type: none"> 1. Written notice will not affect one who cannot read. 2. Carrier must see that notice is made effectual. 3. Must be shown that knowledge of notice came to consignor and that he assented. 4. But former dealings with same party may be presumptive evidence. 5. Carrier cannot stipulate for exemption from liability for negligence. | <ol style="list-style-type: none"> 6. But carrier may stipulate for exemption from responsibility as an insurer. 7-15. Review of the cases bearing on the rules here stated. 16. Limitation of the liability of ship-owners under the act of Congress. 17. Contracts exempting carriers from liability construed strictly. |
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§ 178. 1. The courts have from time to time been accustomed to ingraft such exceptions, in regard to the effect of carriers' notices, as seemed necessary to render their operation reasonable and just. * It was held that such notice could have no effect, by being posted upon the office of the carrier, if the owner of the goods or the party who delivers them at the office cannot read.¹ (a)

¹⁵ Great Northern Railway Co. v. Behrans, 7 H. & N. 950. See also Wilson v. Freeman, 3 Camp. 527.

¹⁶ Mann v. Baker, 2 Stark. 255.

¹⁷ Shaw v. York & North Midland Railway Co., 13 Q. B. 347.

¹ Davis v. Willan, 2 Stark. 279. ABBOTT, J., here says, a notice, to have effect, must be brought "plainly and clearly to the mind of the party who deals with them. . . . It may happen that the party cannot read, and if it so happen, it is the misfortune of the carrier, or his fault, that he does not communicate his intention by some other means."

(a) A bill of lading, issued several days after shipment and after knowledge of a loss, will not limit the liability. Wilde v. Merchants' Despatch

2. In another case, where the party delivering the goods could read, and had seen the carrier's notice upon a board hanging in the office, but, *not supposing* it interested him, had, in fact, never read it, it was held he was not affected by it. Lord ELLENBOROUGH said at the trial, "You cannot make this notice to this *non-supposing* person. . . . The hardship of the case cannot alter the liability of the party." The rule is here laid down by this learned and eminent judge, that the carrier must see to it that he adopts such a medium of notice that the party with whom he deals shall be "effectually apprised of the terms upon which he proposes to deal."² (b)

3. And it was held the notice was insufficient if the advantages of the mode of carriage were stated in large letters and the conditions and exemptions in small letters.³ So, too, if the printed notice be in a place where the party would not ordinarily see it, in the mode in which he came to the office, it could have no effect upon the liability of the carrier.⁴ So, too, where the goods were delivered at a station where no notice was put up, although notices were put up at each terminus of the route.⁵ All

² *Kerr v. Willan*, 2 Stark. 53. When the case came before the full bench, on motion for new trial, the court said, in regard to the duty to make the notice effectual, "If the agent could not read, he might be able to hear, or, at all events, a handbill might be delivered to him, to be taken to his principal." The rule of law may be superseded by special contract, but it must be proved, and whether it exists or not is always a question for the jury. See also *Blossom v. Dodd's Express*, 43 N. Y. 264; s. c. 2 Redf. Am. Railw. Cas. 86.

³ *Butler v. Heane*, 2 Camp. 415.

⁴ *Walker v. Jackson*, 10 M. & W. 161; *Gouger v. Jolly*, 1 Holt N. P. 317.

⁵ *Gouger v. Jolly*, *supra*. GIBBS, C. J., says, "The carrier is liable, unless express notice is brought home to the plaintiff." This is the ground assumed in all the cases. *Beekman v. Shouse*, 5 Rawle, 179; *Bean v. Green*, 3 Fairf. 422; *Story Bailm.* § 558; *Brooke v. Pickwick*, 4 Bing. 218. BEST, C. J., here

Co., 47 Iowa, 247. And see *Gaines v. Union Transportation & Insurance Co.*, 28 Ohio St. 418. A contract limiting the liability of the carrier need not be by express words. It may be implied from all the circumstances, the course of business, regulations known to shippers, &c. *Elkins v. Empire Transportation Co.*, 81½ Penn. St. 315. As from mere receipt of a bill of lading containing the limitation. *Ryan v. Missouri, Kansas, & Texas Railroad Co.*, 23 Am. & Eng. Railw. Cas. 703. But neither usage nor custom, not clearly assented to as a condition of the contract, will avail to relieve the carrier. *Pittsburg, Cincinnati, & St. Louis Railway Co. v. Barrett*, 36 Ohio St. 448.

(b) See *supra*, § 177.

this shows very clearly that such notices, by printed cards or inserted in newspapers, * are not sufficient, unless it be shown that knowledge of the contents of such notices came to the party, and this is always a question for the jury.⁶ And there should be positive evidence of assent to the condition contained in the notice, it is said, in some cases, and this question of assent is to be determined by the jury upon the evidence *aliunde*, and not upon the terms of the receipt merely.⁷ But where the carrier regularly issued his handbills every month, which contained a notice that he would only receive goods upon the condition that he was not to be liable for inward condition, leakage, and breakage, and that he should not be responsible for any loss or damage to the goods during the voyage; and it was conceded that the plaintiff had received such circular regularly; it was held he could not recover of the carrier for the loss of a cask of brandy which he had given the carrier for transportation, and which had got staved during the voyage. The court regarded the circular as forming the basis of the contract between the parties.⁸

lays down the rule, in regard to notices, that it is not enough to post them up in a conspicuous place in the office of the carrier, but they must be at the pains *to make the customer understand* the restrictions upon their responsibility which they propose to assert. This is the only safe rule; and unless this be clearly shown, the leaving of the goods, without objection, seems to be no ground whatever of presuming against the owner. And even with this, it is still a question for the jury, whether he expected to be bound by it, or, in other words, whether he supposed, at the time, that the carrier so understood the matter. *Supra*, §§ 177, 178.

⁶ *Clayton v. Hunt*, 3 Camp. 27; *Rowley v. Horne*, 3 Bing. 2. In this case the defendant proved that the plaintiff had regularly taken a weekly newspaper, in which his advertisements were constantly inserted, for over three years. The jury having found a verdict for plaintiff for the full loss sustained, the full bench refused a new trial. They said it could not be assumed that a party read all the contents of any newspaper he might take. The carrier should fix upon the party a knowledge of the notice, and this he might easily do, by delivering to each one who brought a parcel a printed copy of such notice.

⁷ *Michigan Central Railroad Co. v. Hale*, 6 Mich. 248; *Wilson v. Chesapeake & Ohio Railroad Co.*, 21 Gratt. 654. But exceptions in bills of lading have been held to amount to special contracts. *Illinois Central Railroad Co. v. Frankenburg*, 54 Ill. 88.

⁸ *Phillips v. Edwards*, 3 H. & N. 813. And when on delivery of the goods the carrier gave a bill of lading excepting loss by fire, which the consignor did not read, and the goods were lost by fire, the contract was held to excuse the

4. But the carrier may give evidence of the manner of transacting similar previous business between him and the plaintiff as presumptive evidence of notice, and an implied special acceptance in this particular case.⁹

* 5. But notwithstanding such notice that parcels are to be at the risk of the owner, and this assented to by the owner, the cases chiefly agree that the carrier is still liable for gross or even ordinary neglect,¹⁰ (c) and many of the earlier and best considered

carrier on the ground that the consignor should have read it. *Grace v. Adama*, 100 Mass. 505.

⁹ *Roskell v. Waterhouse*, 2 Stark. 461. In this case the evidence was that the plaintiff had sent similar parcels by defendant, which had been lost, and no action brought for the loss. In *Mayhew v. Eames*, 3 B. & C. 601, the principals had previous parcels sent by the same carriers, and had received at such times their printed notices, and the court held that sufficient notice, although in this case their agent delivered the parcel to the carriers without any knowledge that they had given notice that they would not be responsible for bank-notes, unless entered and paid for accordingly. The court say the principals should have apprised their agent of this notice, and instructed him not to send without insuring. Notice to the principals in another transaction is good in this, but not so of notice to the agents. Notice to the agents, in order to bind the principals, must be in the same transaction, or at least in his mind at the time. *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252; *Dresser v. Norwood*, 14 C. B. N. S. 574; s. c. 17 C. B. N. S. 466. The principal and agent, so far as the same transaction is concerned, are to be regarded for purposes of notice as identical. *Fitzsimmons v. Joslin*, 21 Vt. 140. Notice to the servant in charge is notice to the master. *Baldwin v. Cassella*, 41 Law J. 167; 26 Law T. 707; *infra*, § 182.

¹⁰ *Infra*, pl. 7-16, and cases cited. See also *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 205; s. c. 2 Redf. Am. Railw. Cas. 52, and cases cited. *Powell v. Pennsylvania Railroad Co.*, 32 Penn. St. 414; s. c. 2 Redf. Am. Railw. Cas. 364; *Illinois Central Railroad Co. v. Morrison*, 19 Ill. 136. Where the plaintiff contracted to have cattle carried on defendants' train at a lower rate than the usual charge, and stipulated to assume the risk of transportation, and accompanied and had them in charge during the transportation, it was held that there had been no complete delivery to the company, and that the company was liable only for gross or wilful misconduct. *Ib.* And the same rule was adopted in *Goldey v. Pennsylvania Railroad Co.*, 3 Penn. St. 242. Contracts for the owner of goods to assume all risks of transportation will not extend to the negligence of the carrier or his servants. *Pennsylvania Railroad Co. v. Butler*, 57 Penn. St. 335; *School District v. Boston Hartford, & Erie Railway Co.*, 102 Mass. 552. But the burden of proving

(c) See *supra*, § 177.

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English cases regard such notices as having no reference whatever to the ordinary risks of transportation, but as only intended to relieve the carrier from those extraordinary responsibilities which the common law had imposed upon this class of bailees. And it cannot be denied that this view of the subject has very much to commend it to our favorable consideration. There is certainly something very incongruous, and not a little revolting to the moral sense, that a bailee for hire should be allowed to stipulate for exemption from the consequences of his own negligence, ordinary or extraordinary. A laborer, domestic, or mechanic, who should propose such a stipulation, would be regarded as altogether unworthy of confidence in any respect, and the employer who should submit to such a condition, must be reduced to extreme necessity, one would suppose. We could scarcely believe that any competent tribunal would for a moment entertain such a proposition, if we did not know that the ablest courts in Westminster Hall had done so. This question is considerably discussed in some of the late cases in the English courts, under the Railway and Canal Traffic Act.¹¹ In the Court * of Exchequer¹² it was decided, on solemn argument, that a notice of the company, assented to by the consignee, and which by consequence became a contract, that in regard to live stock they would not be liable for any injury or damage howsoever caused, was a reasonable contract, and excused the company for a loss occurring from a defect in the box in which a horse was carried, this defect not being known to the servant who put it to the use where the damage occurred. But in the same case in the Exchequer Chamber,¹³ upon great consideration, it was held that such a contract was unreasonable, within the statute requiring the court to determine the question of the reasonableness of contracts by carriers for exemption from responsibility; and that it was therefore void under the statute, and that it did not protect the company from liability in respect of the defect in the truck.

negligence is cast upon the plaintiff in such cases. *Bankard v. Baltimore & Ohio Railroad Co.*, 34 Md. 197. In such cases the carrier is not excused unless he exercises the care and prudence of a prudent man in his own affairs. *Express Co. v. Kountze*, 8 Wal. 342.

¹¹ Statute 17 & 18 Vict. c. 31, § 7.

¹² *McManus v. Lancashire & Yorkshire Railway Co.*, 2 H. & N. 693.

¹³ 4 H. & N. 327. It is here said that the statute is to be construed with reference to the state of the law relating to carriers at the time it was passed.

6. But that a carrier by steamboat or railway, or indeed, in any other mode, should be allowed to stipulate for exemption from insurance of the goods, or else demand a premium and specification, as in other cases of insurance, seems highly just and reasonable.¹⁰ (*d*)

7. In *Duff v. Budd*,¹⁴ the carrier was held liable for delivering a box to a wrong person, notwithstanding a notice that he would not be liable for parcels of that description, the judge directing the jury that the carriers' negligence had been such as to render it unnecessary to consider the question of the notice, and the full bench, on argument, refused a new trial.

8. And in *Garnet v. Willan*,¹⁵ where the carrier delivered the parcel to another line of carriers, and it was lost before it reached its destination, it was held, notwithstanding a similar notice, the first carrier was liable. In both these cases the carrier was held liable as for gross negligence. And *Beck v. Evans*¹⁶ was decided upon the same ground, and involves the very same point.

* 9. In *Bodenham v. Bennett*,¹⁷ it was held that such notices are only intended to exempt carriers from extraordinary events, and in the language of Baron Wood, "were not meant to exempt from due and ordinary care."

10. In *Batson v. Donovan*,¹⁸ BEST, J., said, "The only effect of the notice is that employers are informed that carriers will not be insurers of goods above a certain value, unless paid a reasonable premium of insurance." And the learned judge insists with

¹⁴ 3 Brod. & B. 177.

¹⁵ 5 B. & Ald. 53. And in such case the jury having found that the risk was increased by the change of carriers, the first carrier is liable, even where he was *deceived* as to the value of the parcel. *Sleat v. Fagg*, 5 B. & Ald. 342; *infra*, pl. 10, note 19.

¹⁶ 16 East, 244. *Smith v. Horne*, 8 Taunt. 144, is to the same effect. So also is *Reno v. Hogan*, 12 B. Monr. 63.

¹⁷ 4 Price, 31. *Birkett v. Willan*, 2 B. & Ald. 356, is decided on the authority of *Bodenham v. Bennett*, and holds that such notice, assented to by the owner of the goods, will not excuse the carrier for gross negligence. The rule laid down in the text is confirmed, as to a contract for transporting live stock excusing the carrier from all responsibility, where the injury occurred from the insecure fastening of the cars. *Indianapolis, Pittsburg, & Cleveland Railroad Co. v. Allen*, 31 Ind. 394.

¹⁸ 4 B. & Ald. 21.

(*d*) See *Maslin v. Baltimore & Rhodes v. Louisville & Nashville Ohio Railroad Co.*, 14 W. Va. 180; *Railroad Co.*, 9 Bush, 688.

great earnestness that the carrier and his servants must, in cases of this kind, notwithstanding the notice, assented to by the owner of the goods, "take the same care of them that a prudent man would take of his own property," which seems just and reasonable. But the majority of the court held in this case (BEST, J., *dissentiente*), that the plaintiff, by delivering a box containing bills, checks, and notes to the value of £4,072, without intimating that the contents were valuable, when he knew that the carrier expected a premium for insurance in such cases, was guilty of such fraud and deception as to preclude a recovery, except for such gross neglect as would be reprehensible if the parcel had been of less value than £5, the limit named in the carrier's notice. And we see no reason to question the soundness of the grounds upon which the case is put,¹⁹ and it seems to us entirely consistent with the general views assumed by BEST, J.

* 11. The general rule of law upon this point is well stated by Baron PARKE.²⁰ "The weight of authority seems to be in favor of

¹⁹ See *infra*, § 185, and cases cited. But such condition requiring notice of the value of the parcel will have no operation where the carrier knew the parcel to contain gold at the time of receiving it. *Kember v. Southern Express Co.*, 22 La. An. 158. Some of the early cases do not seem to regard a deception in reference to the contents of a parcel delivered to a carrier, as excusing the carrier from his common-law liability of insurer, there being no notice from the carrier in regard to being informed of the contents of valuable parcels. *Kenrig v. Eggleston*, Aleyn, 93. So in the case from 1 Vent. 238, cited by Lord MANSFIELD, in *Gibbon v. Paynton*, 4 Bur. 2298. But his lordship, who saw through all disguises, dissented emphatically from any such rule of responsibility, and indorsed the case of *Tyly v. Morrice*, Carth. 485, as "being determined on the *true* principle that the carrier was liable *only* for what he was *fairly told of*." In *Tyly v. Morrice* two bags were delivered to the carrier sealed up, said to contain £200, and receipted accordingly, the consignee to pay 10s. per cent for carriage and *risk*. The carrier was robbed, and the chief justice was of opinion that the plaintiff should recover for £200 only, the undertaking and the reward being for that sum, saying that "since the plaintiff had taken this course to *defraud the carrier of his reward*, he had thereby barred himself of that remedy which is *founded only on the reward*." In *Gibbon v. Paynton*, £100 in gold was put into an old nail bag, and the bag filled with hay to give it a mean appearance, and no intimation given to the carrier of its value. The bag and hay arrived safe, but the money was gone. The jury found a verdict for defendant, and the court unanimously denied a new trial. The rule laid down in *Tyly v. Morrice*, and so adopted in *Gibbon v. Paynton*, is law at the present time.

²⁰ *Wyld v. Pickford*, 8 M. & W. 443; *Hall v. Cheney*, 36 N. H. 28.

the doctrine, that in order to render the carrier liable, after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence, — gross negligence in the sense in which it has been understood in the last-mentioned cases [*Batson v. Donovan*, and *Duff v. Budd*]. And the effect of such notice is, that the carrier will not be responsible, at all events, unless he is paid a premium, — but still he undertakes to carry, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage. And after such notice it may be that the burden of proof of damage or loss by want of such care would lie upon the plaintiff.”

12. This seems to be placing the effect of such notices upon a reasonable basis, and most of the American cases will be found to have adopted, in the main, similar views. The United States Supreme Court, in a case ²¹ of great importance, assume this

²¹ *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; s. c. 2 Redf. Am. Railw. Cas. 34. This was a case, as before stated, where an express carrier, by special contract with the company, was allowed to carry a certain crate on the company's boats, under the care and oversight of the expressman, upon the express stipulation that all persons delivering parcels, to be carried by express, should have a notice annexed to the receipt or bill of lading executed for the goods, and also to his advertisements, published in the public prints, or elsewhere, to the effect that the expressman and not the company was responsible for articles committed to his care. Money which the expressman had undertaken to carry was on one of the company's boats, when it was burned through the gross mismanagement of the company's agent, and the money lost. It was held that the company was not excused for want of ordinary care, and was therefore liable.

The same view is adopted in *Clark v. Faxton*, 21 Wend. 153; *Dorr v. New Jersey Steam Navigation Co.*, 4 Sandf. 136; *Parsons v. Monteath*, 13 Barb. 353; *Stoddard v. Long Island Railroad Co.*, 5 Sandf. 180; *Fish v. Chapman*, 2 Kelly, 349. Most of the American cases have maintained the principle, that a carrier cannot, by special notices, brought to the knowledge of the owner of the goods, or by contract even, exempt himself from the duty to exercise ordinary care and prudence in the transportation of freight and baggage. *Sager v. Portsmouth Railroad Co.*, 31 Me. 228; s. c. 2 Redf. Am. Railw. Cas. 263; *Camden & Amboy Railroad Co. v. Bauldauff*, 16 Penn. St. 67; s. c. 2 Redf. Am. Railw. Cas. 267; *Laing v. Colder*, 8 Penn. St. 479; *Bingham v. Rogers*, 6 Watts & S. 495, 500. The case of *Camden & Amboy Railroad Co. v. Baldauf*, was that of a German, who could not read English. The railway advertised that it would carry fifty pounds baggage

*ground, in terms. The opinion of Mr. Justice NELSON is worthy of consideration upon this point.

* 13. But some of the later English cases, before the late statute, the Railway and Canal Traffic Act of 1854,²² had departed essen-

for each passenger, and that passengers were "expressly prohibited from taking anything as baggage, but their wearing apparel, which will be at the risk of the owner." The plaintiff had, in a trunk with his ordinary baggage, two thousand one hundred and one five franc pieces. He paid for extra weight, and gave it in charge of the proper servant of the railway. The trunk was lost. The court held the company liable because it had failed to show the manner of the loss, and the law presumed negligence, from the loss, and because it had failed to show that the contents of the notice came to the knowledge of the plaintiff, which left it liable, as an insurer, at common law. In giving judgment, the court, ROGERS, J., says, the company was bound to exercise the ordinary care of a bailee for hire, and could not discharge itself even by special agreement.

In *Pennsylvania Railroad Co. v. McCloskey*, 23 Penn. St. 526, 532; s. c. 2 Redf. Am. Railw. Cas. 466, the court say, in giving judgment, that "assuming that a public company of carriers may contract for other exemptions from liability, than those allowed by law, still such a contract will not exempt from liability for gross negligence." In *Baker v. Brinson*, 9 Rich. 201, it is decided, that where a carrier limits his liability, by special contract, the burden is on him to show that the loss is within the exception, and that he was guilty of no negligence. See also, to same effect, *Graham v. Davis*, 4 Ohio St. 362. See also *Baldwin v. Collins*, 9 Rob. La. 478; *Newstadt v. Adams*, 5 Duer, 43.

²² *Infra*, §§ 179, 185, and notes. In *Austin v. Manchester, Sheffield, & Lincolnshire Railroad Co.*, 10 C. B. 454; s. c. 11 Eng. L. & Eq. 506, the defendants let their trucks to the plaintiff, for the conveyance of certain horses by the defendants' engines along their railway, and delivered to the plaintiff a ticket, or notice, to the effect, "that the charge was for the use of the carriages and the locomotive power only, and that the plaintiffs were to see to the sufficiency of the carriages, before they allowed their horses or live stock to be placed therein; that the defendants would not be responsible for any alleged defects in their carriages, unless complaint was made at the time of booking, or before the same left the station, nor for any damages, however caused, to horses," &c. It was held that the plaintiff could not recover for damage done to his horses, in the transportation, through the breaking of an axle-tree, which was attributable to the culpable negligence of the company's servants.

And in *Chippendale v. Lancashire & Yorkshire Railway Co.*, 7 Eng. L. & Eq. 395; s. c. 15 Jur. 1106, in a case where the owner of cattle transported on defendants' railway, saw them put in the carriages, and signed a ticket, conditioned that the owner undertake "all risks of conveyance whatever," it was held that there was no implied stipulation that the carriage should be fit for the conveyance of the cattle. And in *Carr v. Same*, 7 Exch. 707; s. c. 14

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tially * from the basis upon which the earlier cases, in regard to notices in that country, rested.

Eng. L. & Eq. 340, on a similar contract, where plaintiff's horse was injured, by the horse-box being propelled against some trucks, through the gross negligence of the company, it was held (PLATT, B., *hesitante*), that the company was not responsible.

Said PARKE, B.: "The jury have found that the defendants have been guilty of gross negligence, and that must be taken as a fact. In my opinion the owner of the horse has taken upon himself the risk of conveyance, the railway company being bound merely to find carriages and propelling power; the terms of the contract appear to me to show this. The company say they will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description, travelling upon their railway. This, then, is a contract by virtue of which the plaintiff is to stand the risk of accident or injury, and certainly, when we look at the nature of the things conveyed, there is nothing unreasonable in the arrangement.' The learned Baron then stated the case of *Austin v. Manchester, Sheffield, & Lincolnshire Railway Co.*, 17 Q. B. 603; s. c. 5 Eng. L. & Eq. 329, and then continued: "In that case the accident was occasioned by the wheels not being properly greased; in the present case the carriage that contained the plaintiff's horse was driven against another carriage. We ought not to fritter away the meaning of contracts merely for the purpose of making men careful. That is a matter that we are not bound to correct. The legislature may, if they please, put a stop to contracts of this kind, but we have nothing to do with them except to interpret them when they are made." But the opinion of PLATT, B., seems far more consonant with reason and justice, and with the principle of the decided cases, both English and American. The learned Baron says, "The declaration states that the defendants were guilty of gross negligence, and that fact was proved. The *gravamen* of the charge is the gross negligence. . . . Now, undoubtedly, since the establishment of railways, new subjects of conveyance have arisen. Formerly, horses were seldom carried, but now they are ordinarily conveyed by the trains. It is therefore said that new stipulations are necessary to guard carriers from the risks which are incidental to this new mode of conveyance. It is suggested that the animal may be alarmed by the noise of the engine, by the speed of the carriages, and by various other causes, and that, unless we take upon ourselves the office of legislation, this ticket absolves the carriers from all responsibility. I own I am startled at such a proposition, and considering the high authority by which it is supported, I feel I ought to doubt and to distrust my own opinion. But I am bound to say that I am not satisfied that the language of this ticket absolves the railway company from all liability for damage. I cannot help thinking that the owner of the goods never dreamed of such a thing when he signed this contract. In truth, this accident had nothing to do with the conveyance of the horse. The accidents referred to are those which occurred whilst the article is in a state of locomotion. The case of gross negligence, as it seems to me, is not pointed at by this contract." And in *McManus v. Lancashire & York-*

* 14. We have arranged these cases in a note²² in this section, as a remarkable illustration of the tendency of *judicial

shire Railway Co., 2 H. & N. 693; s. c. 30 Law T. 321, the same rule is maintained as in *Chippendale v. Lancashire & Yorkshire Railway Co.*

In *Wise v. Great Western Railway Co.*, 36 Eng. L. & Eq. 574; s. c. 1 H. & N. 63, where a horse was delivered to defendants to be carried to W., and the person delivering it signed a writing, agreeing to abide by a notice contained in it, that the directors would not be answerable for damage done to any horses conveyed by the railway, and the horse reached the station at W. safely, but the company's servants either did not notice it, or forgot that the horse had arrived, and on the plaintiff's calling for it the next day it was discovered in a horse-box on the siding, and found to have sustained serious injury from cold, and from remaining in a confined position all night, it was held that the company was protected under the statute by the signed contract. And it would seem that in such case the company would not be liable independent of the contract, the first fault being plaintiff's not being there to receive the horse on its arrival at the station. See *supra*, § 175.

It does not seem to be regarded as important, aside from the statute that the owner of the goods should sign any writing, or indeed that he should even receive a printed ticket, on notice of terms of carriage; but if he is in any way made aware of the terms on which the carrier expects to receive his goods, and consents to deliver them without the carrier, or some one authorized to act on his behalf, distinctly receding from the terms of the notice, he is bound by it. *York, Newcastle, & Berwick Railway Co. v. Crisp*, 14 C. B. 527; s. c. 25 Eng. L. & Eq. 396. In the case of *Walker v. York & North Midland Railway Co.*, 2 Ellis & B. 750; s. c. 22 Eng. L. & Eq. 315, the owner of the goods distinctly informed the station-agent that the company's notice was not binding on him. Yet inasmuch as the notice itself stated that neither the station-clerk nor other servants of the company had any authority to alter or vary the terms of the notice, the court held the plaintiff bound by these terms, one of which was that the company was not to be responsible for the delivery of fish in any certain or reasonable time, nor in time for any market, nor for any loss or damage arising from any delay or stoppage, &c.

The learned judge told the jury that if the plaintiff had been served with the notice, and afterwards forwarded the fish, they ought to infer an agreement on his part to be bound by the terms of the notice, unless there appeared an unambiguous refusal on his part to be bound by the notice, and an acquiescence by the company in that refusal. It was held by the full bench that the direction was right. See also *Morville v. Great Northern Railway Co.*, 10 Eng. L. & Eq. 366; *Willoughby v. Horridge*, 12 C. B. 742; s. c. 16 Eng. L. & Eq. 437; *Crouch v. London & Northwestern Railway Co.*, 7 Exch. 705. And the case of *Fowles v. Great Western Railway Co.*, 7 Exch. 699; s. c. 16 Eng. L. & Eq. 531, although determined on a question of variance, clearly assumes the ground that a carrier's notice will exonerate him from his general obligation. *York, Newcastle, & Berwick Railway Co. v. Crisp*, 14 C. B. 527; s. c. 25 Eng. L. & Eq. 396. But the case of *Hearn v. London and Southwest-*

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administration to bewilder and to delude the wisest and the most profound, when they suffer themselves to be seduced into the belief that it is safe to follow any theory or abstraction, however specious, a moment longer than its results commend themselves to our sense of justice, certainly after they begin most unequivocally to excite sentiments of a more painful character, as many of the English decisions upon the subject of carriers' exemption from liability, even for gross neglect and wilful misconduct, could scarcely fail to do, when it was borne in mind that the entire business population of the realm almost was at the mercy of these same carriers. It is surely not to be regarded as matter of surprise, that the legislature felt compelled to interfere, to restore something of the reasonable responsibility of common carriers.²²

* The carrier is bound to carry safely, and if he fail to do so the burden is upon him to show a valid excuse. But if the contract of affreightment provide that such carrier shall not be liable for unavoidable damages of navigation, this has been construed to mean unavoidable by them, with the exercise of all the precaution, care, and skill, which the law demands of common carriers.²³ If

ern Railway Co., 10 Exch. 798; s. c. 29 Eng. L. & Eq. 494, seems to manifest in some respects a disposition in the English courts to hold common carriers to something like reasonable accountability, which some of the former cases had apparently regarded as nearly hopeless, under their most extraordinary notices. But this case is noticed more at length under § 185, where the present state of the English law is stated.

Many of the later cases in this country seem still inclined to hold the carrier to his common-law responsibility, unless he shows a special contract to exonerate him from it, or a notice brought home to the owner of the goods, and assented to by him. *Supra*, § 177, note 3; § 178; note 21. And even in that case he is still responsible for ordinary care. And if a loss occur in a case where the carrier is exempt by special contract from certain risks, the burden of proof is on the carrier to show that the loss occurred in consequence of such excepted risks. *Davidson v. Graham*, 2 Ohio St. 131. See also *Slocum v. Fairchild*, 7 Hill. 292; *Whitesides v. Russell*, 8 Watts & S. 44; *Baker v. Brinson*, 9 Rich. 201. See also *Berry v. Cooper*, 28 Ga. 543. But where gold dust was received on board a steamboat, with express notice from the clerk of the boat that he would receive it only on condition that no charge was to be made and no responsibility incurred, and the dust was stolen from the boat without any negligence on the part of the officers of the boat, it was held that the owners were not liable. *Fay v. The New World*, 1 Cal. 348.

²² *Hayes v. Kennedy*, 3 Grant, 351; s. c. 41 Penn. St. 378. The meaning of the terms "act of God," "inevitable accident," &c., are here discussed.

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the accident fell upon them without any previous fault of theirs, but in consequence of the vessel and crew proving deficient, after they had done all in their power, it is here said the defendants should be as free from liability as from fault. But common carriers should see to it that they have a sufficient boat and crew, and the fact it proves otherwise would seem to charge them with fault. But a loss by collision is covered by the exception in the bill of lading, "unavoidable dangers of the river navigation," if the carrier was without fault, although the collision was caused by the negligence of those navigating the other vessel. Under the late English Railway and Canal Traffic Act, if the carrier refuse to receive the goods, unless the owner assent to certain conditions which the judge trying the case considers reasonable, and the goods are left on these conditions, the carrier is not liable as a common carrier but only upon the special undertaking.²⁴

15. In a recent case²⁵ before the United States Supreme Court, it was held that carriers may, by express contract with the owner, limit or qualify their common-law responsibility, provided such contract do not attempt to cover losses by negligence or misconduct. Thus where the bill of lading exempted the carriers from responsibility for loss by fire, and the goods were destroyed by fire without the fault of the carriers, they were held excused.²⁶

16. The Act of Congress of 3d March, 1851, exempts the owners of vessels from responsibility for losses by fire caused by the negligence of their officers or agents, in which the owners had no direct participation. The proviso to this act allowing parties to contract in regard to the responsibility of such owners, refers to express contracts.²⁷ A local custom that ship-owners shall be responsible * in such cases for the negligence of their officers and agents is not a good custom, being directly opposed to the statute.²⁸

17. And it seems but reasonable, that where carriers are allowed to relieve themselves from their responsibility as insurers, by special contract or notice assented to, that the contract should be construed most strictly against them, and where it in terms embraces only a portion of the risks of the transportation, their

²⁴ *White v. Great Western Railway Co.*, 40 Eng. L. & Eq. 255; s. c. 2 C. B. x. s. 7.

²⁵ *York Co. v. Illinois Central Railroad Co.*, 3 Wal. 107.

²⁶ *Walker v. Western Transportation Co.*, 3 Wal. 150.

responsibility in other respects should be held as at common law.²⁷ And in all cases the carrier is bound to exercise extreme caution against fire communicating from the engine to combustible freight.²⁸

SECTION XIII.

Notices as to Ordinary and Extraordinary Liability of Carriers.

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| <ol style="list-style-type: none"> 1. Degrees of liability distinguished. 2. English cases do not seem to recognize the distinction. 3. Question often raised under English statutes. 4. Reasonable to claim exemption from risk in transporting fresh fish. 5. So, in carrying dogs and horses, may limit liability to a stated moderate sum. 6. How limitation must be claimed and secured under English statute. | <ol style="list-style-type: none"> 7. Unreasonable conditions illustrated. 8. Exemption from liability for goods insufficiently packed. 9. Exemption from all liability for injury to cattle in transit. 10. Injury to cattle by carrying beyond the station. 11. Exception of one risk cannot cover another. 12. Carrier always responsible for negligence. |
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§ 179. 1. Many of the American writers, and some of the American courts, point to a distinction between notices of carriers which propose to exonerate the carrier from all liability, even for gross neglect and possibly for positive misfeasance and wrong, and such as have reference only to exemption from that extraordinary responsibility imposed by the common law, by which they become insurers.¹ (a) This distinction is pointed out by Prof. Green-

²⁷ *Great Western Railroad Co. v. Hawkins*, 18 Mich. 427. But in *Michigan Southern & Northern Indiana Railroad Co. v. McDonough*, 21 Mich. 165, 205, the rule above laid down is somewhat modified, *supra*, § 177, note 9. See also *McDaniel v. Chicago & Northwestern Railway Co.*, 24 Iowa, 412. And if the contract is unlawful in one of the states through which the transportation extends it is void as to all. *Ib.*

²⁸ *Empire Transportation Co. v. Wamsutta Oil Co.*, 63 Penn. St. 14; *supra*, § 125, pl. 4, note 4. The general subject of the effect of notices by common carriers, or special contracts exempting them from responsibility, is ably discussed by COOLEY, J. in *McMillan v. Michigan Southern & Northern Indiana Railroad Co.*, 16 Mich. 79.

¹ The court in *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186-206; s. c. 2 Redf. Am. Railw. Cas. 52, makes use of the fol-

(a) See *supra*, §§ 177, 178

leaf,² * and adopted by Mr. Angell in his treatise on Carriers.³ And Prof. Parsons, in his treatise upon Contracts, has an elaborate and learned note upon the subject, in which he adopts fully the distinction, and arrives at the same conclusion here suggested.⁴

2. But the English cases do not seem to have brought out this distinction so clearly as the American writers upon this subject. It seems to be supposed, by many of the English judges, and some of the late English cases seem to go that length under their late statutes (which we have referred to, §§ 178, 185), that there is no positive objection to recognize the right of a common carrier to stipulate for exemption from all liability, even for gross neglect or positive misfeasance.⁵

lowing language: "But we regard it as well settled, that the carrier may, by general notice, brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions, as having notice of the kind and quantity of the things deposited for carriage, and a certain reasonable rate of premium for the insurance paid, beyond the mere expense of carriage."

² 2 Greenl. Ev. § 215, where the author seems to put forth substantially the same view. "It is now well settled that a common carrier may *qualify his liability*, by a *general notice* to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly. But the right of a common carrier, by a general notice to *limit, restrict, or avoid the liability*, devolved upon him by the common law on the most salutary grounds of public policy, has been denied in several of the American courts, after the most elaborate consideration."

³ Angell Car. § 245.

⁴ 2 Parsons Cont. 234, note (j), 238, note (n).

⁵ *Maving v. Todd*, 1 Stark. 72. This was a case where the goods, while on the premises and in the care of the carrier, had been destroyed by an accidental fire. It appearing that the carrier had so limited his responsibility that it did not extend to loss by fire, HOLROYD, J., submitted whether defendants could exclude their responsibility altogether; that this was going further than had been done in the case of carriers, who had only limited their responsibility to a certain amount. But Lord ELLENBOROUGH said, "Since they can limit it to a particular sum, I think they may exclude it altogether, and that they may say we will have nothing to do with fire." *Leeson v. Holt*, 1 Stark. 186, is similar. This was where the carrier had given notice that the species of goods for which the suit was brought would be "entirely at the risk of the owners, as to damage, breakage, &c." Lord ELLENBOROUGH said, in summing up, "In the present case they [the carriers] seem to have excluded all respon-

3. Under the more recent English statute,⁶ requiring carriers to annex only reasonable conditions to notices or special contracts connected with their transportation, the question has very often arisen of late, and the distinction between ordinary and extraordinary hazards has been often alluded to in discussing questions under that statute.

4. Thus a contract to transport fresh fish was held to involve such extraordinary risks that the carrier might reasonably annex * a condition relieving him from all responsibility in consequence of any delay in the arrival of the trains and consequent loss of market, unless it arose from his own gross negligence.⁷ (b)

5. And it has often been held that carriers might reasonably limit the extent of their responsibility for the loss or injury of dogs and horses on their trains, to a certain average and moderate value, unless the value was declared and a premium for insurance above the average value paid.⁸ The reasonableness of such a con-

sistency whatsoever, so that under the terms of the present notice, if a servant of the carrier had, in the most wilful and wanton manner, destroyed the furniture intrusted to him, the principal would not have been liable." See *Phillips v. Edwards*, 3 H. & N. 813.

⁶ Statute 17 & 18 Vict. c. 31, § 7.

⁷ *Beal v. Devon Railway Co.*, 8 W. R. 651. It is here said, that in the case of a carrier, gross negligence imports the want of that reasonable care, skill, and expedition which may properly be expected from him. s. c. 3 H. & C. 337.

⁸ *Harrison v. London, Brighton, & South Coast Railway Co.*, 2 B. & S. 122; s. c. 6 Jur. n. s. 954. There is a very able article in the *Albany Law Journal*, copied into 24 *Am. Railw. T.* 177, in regard to the transportation of dogs by railways, from which it would seem that no cases have occurred in the American courts. But in *Michigan Southern & Northern Indiana Railroad Co. v. McDonough*, 21 Mich. 165, the proposition is attempted to be maintained, that the common-law duty of common carriers does not embrace live animals, and that it is therefore competent for them to annex such terms and conditions to the transportation of such freight as they may deem expedient. The question of the proper limitations which carriers may impose as to the transportation of all live animals, and the legal responsibilities resulting from the business of their transportation, are well presented by CHRISTIANCY, J., in *Michigan Southern & Northern Indiana Railroad Co. v. McDonough*, *supra*. And see *supra*, § 167.

(b) See *Manchester, Sheffield, & Manchester, Sheffield, & Lincolnshire Railway Co. v. Brown*, *Railway Co.*, *Law Rep.* 9 Q. B. 230. *Law Rep.* 8 H. L. 703; *Brown v.*

dition is based somewhat upon the fanciful value often attached to these animals.

6. But under the English statute⁶ the carrier can only restrict his common-law responsibility by a reasonable limitation, which is embraced in a written contract signed by the party interested, or his agent, and such contract must either in itself or by reference set out or embody the condition. A general notice only consented to by the party would be valid for limiting the common-law liability of the carrier; but it must under the statute be embodied in a formal contract in writing, signed by the owner or person delivering the goods, and must be decided to be reasonable by the court.⁹

7. A condition exempting the carrier from all responsibility is unreasonable, and so is a condition that the carrier shall not be responsible for any damage unless pointed out at the time of delivery by the carrier.¹⁰ The burden of showing the reasonableness of a condition annexed to the carrier's undertaking rests upon such carrier.⁹

8. It was held in one case,¹¹ that as carriers were bound to carry * for all who applied, and on reasonable terms, they could not make a condition excusing them from all responsibility for packages insufficiently packed.

9. So, also, a condition on cattle tickets, that the carrier shall be free from all risk or responsibility with respect to any loss or damage arising in the loading or unloading, or in the transit, from any cause whatever, it being agreed that the animals are carried at the owner's risk, and that he is to see to the efficiency of the wagon before the stock is placed therein, and complaint to be made in writing to the company's agent before the wagon leaves the station, is neither just nor reasonable;¹² and such a special

⁶ *Peek v. North Staffordshire Railway Co.*, 9 Jur. n. s. 914; s. c. 10 H. L. Cas. 478; *Aldridge v. Great Western Railway Co.*, 15 C. B. n. s. 582. It is here held that a carrier is not to be regarded as a mere gratuitous bailee in carrying back bags or other containers free of charge, by force of contract made at the time of carrying them filled for pay.

¹⁰ *Lloyd v. Waterford & Limerick Railway Co.*, 9 Law T. n. s. 89, 15 Ir. Com. Law, 37; *Allday v. Great Western Railway Co.*, 11 Jur. n. s. 12.

¹¹ *Garton v. Bristol & Exeter Railway Co.*, 1 Ellis, B., & S. 112; s. c. 7 Jur. n. s. 1234.

¹² *Gregory v. West Midland Railway Co.*, 2 H. & C. 944; s. c. 10 Jur. n. s. 243.

contract cannot be maintained under the English statute, and it would seem ought not to be regarded as fairly and freely entered into by the owner, in the absence of all statutory provision.

10. Where cattle carried beyond the place of destination, and being out of condition, are injured in the sense of that term under the English statute, and unquestionably so under the general responsibility of the carrier, the carrier cannot excuse himself by a general contract with the owner to be relieved from all responsibility for damage in overcarriage, delay, or in the conveying or delivery of said animals.¹³

11. At the plaintiff's request the employes of a railway company, contrary to their general instructions, attached his freight car to a passenger train, he agreeing "to run all risks." Owing to an accident occurring through the negligence of the company's servants, and not, to any extent, caused by attaching the freight car, the plaintiff received an injury, and the company were held responsible, the plaintiff's risk being assumed solely with reference to the effects of attaching the freight car.¹⁴

12. And where the defendants, carriers in India, contracted with the government, by which troops were to be transported, but their luggage, among which were plaintiff's goods, was to remain in charge of a military guard, the company accepting no responsibility; the goods were destroyed by the company's negligence, and they were held responsible, not as for a breach of duty as carriers, but for any * loss occurring through their own negligence, while the goods were in their possession.¹⁵

¹³ *Allday v. Great Western Railway Co.*, 11 Jur. N. S. 12.

¹⁴ *Lackawanna & Bloomsburg Railroad Co. v. Chenewith*, 52 Penn. St. 382. It was here held that the owner of the private car so attached was a passenger.

¹⁵ *Martin v. Great Indian Peninsular Railway Co.*, Law Rep. 3 Exch. 9.

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SECTION XIV.

Responsibility for Carriage over Connecting Roads.

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| <ol style="list-style-type: none"> 1. English rule holds first company liable to the end of the route. 2. This rule not generally followed in the American courts, but cases not in accord. 3. But company may undertake for carriage through. 4. Such an undertaking is presumed when the roads are connected in business. 5. Case of refusal to pay charges demanded, and return of goods before reasonable time. | <ol style="list-style-type: none"> 6. Carriers responsible only for safe carriage and delivery to next carrier according to ordinary usage. 7. Special directions for delivery must be followed. 8. Makes no difference that part of line is by water and part by land. 9. English rule as to implied contract for the entire route. 10. Receiving freight for entire route binds to that extent unless proof be given to rebut that implication. |
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§ 180. 1. The disposition of the English courts, since the establishment of railways, has seemed to be to regard carriers who receive goods, and book them for a certain destination, as responsible throughout the entire route.¹ (a) Since the first case which assumed this position,² there has not been manifested any disposition to recede from it.³ And the English courts have extended the same rule to carriers in England, in the direction of Scotland, where the goods are received and booked for points beyond the limits of England.⁴ And this rule has been carried so far in the English courts that even where the loss is shown to have occurred upon one of the subsequent roads in the route, it is held that the

¹ Hodges Railw. 615.

² Muschamp v. Lancaster & Preston Junction Railway Co., 8 M. & W. 421.

³ Watson v. Ambergate, Nottingham, & Boston Railway Co., 15 Jur. 448; s. c. 3 Eng. L. & Eq. 497; Scotthorn v. South Staffordshire Railway Co., 8 Exch. 341; s. c. 18 Eng. L. & Eq. 553; Wilson v. York Railway Co., 18 Eng. L. & Eq. 557.

⁴ Crouch v. London & Northwestern Railway Co., 14 C. B. 255; s. c. 25 Eng. L. & Eq. 287.

(a) Goods received by a connecting carrier are presumed to be received under the liabilities of the common law. Southern Express Co. v. Urquhart, 52 Ga. 142.

When goods are billed through,

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connecting carriers are jointly and severally liable for injury received in any part of the transit. Gulf, Colorado, & Santa Fe Railroad Co. v. Golding, 23 Am. & Eng. Railw. Cas. 732.

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contract is exclusively with the first company, and that there is no right of action in favor of the owner against any of the subsequent companies on the route.⁵ The same rule is adopted in regard to * passenger baggage.⁶ It seems to us, that by reason of the pressure of two questions in the case last named, the House of Lords, after great labor and pains, have really escaped from a threatening dilemma by falling into more difficulty and doubt, not to say confusion, than either of the alternatives of the original dilemma presented. There was no difficulty in saying that an exemption from responsibility for loss by fire, contained in a receipt-note given by the first company, by fair construction extended to the entire route, although contained only in the written contract with the first company. But the Court of Queen's Bench and the Exchequer Chamber differed upon this point. There would have been more reason in saying, as the American courts do, that the first company is not responsible for the mis-carriage of the other companies. But the court of last resort in England have now put the crowning climax upon this rule, by saying that subsequent companies are not responsible as carriers to the owner of the goods. This is a rule which some of the learned judges dissent from, and which others adopt upon the ground of the written contract in this case; and which we should expect would be ultimately abandoned, as founded upon no fair

⁵ *Bristol & Exeter Railway Co. v. Collins*, 7 H. L. Cas. 194; s. c. 5 Jur. N. S. 1367. But see *Root v. Great Western Railway Co.*, 45 N. Y. 530, where the authority of the last case cited is questioned. And in *Barter v. Wheeler*, 49 N. H. 9, it is distinctly decided that the carrier on whose line the goods are lost, in such case, is responsible to the owner for the same; although where different companies associate in forming a continuous line for the transportation of goods and passengers, each being empowered to contract for freight or passengers for the whole line, and to receive pay for the same, which is divided in a prescribed proportion, they are jointly liable for losses or injuries on any part of the line. And where the line extends through different states, the rights of the parties will be determined by the law of the state where the loss occurs. It may seem inconsistent to hold continuous lines of carriers, each composed of different companies, responsible for all losses jointly, and still to allow a separate action against the particular company on whose line the loss occurs. But the same rule obtains in all cases where there is a connection among different persons, not amounting to a technical partnership among themselves, but still rendering them jointly responsible to parties with whom they deal, if such parties elect to sue them jointly. See *infra*, note 9.

⁶ *Supra*, § 175, note 3.

principle of reason or justice. But if the law of England is altered in this respect, it must be by statute, as the House of Lords will not hear argument upon a point once determined in that court. The difficulty seems to have arisen out of the extreme views adopted there in *Muschamp v. Lancaster & Preston Junction Railway*.² And in a later case,⁷ where oxen were sent from the Craven Arms station on the Shrewsbury and Hereford Railway to Birmingham, that company's line extending to Shrewsbury, and the defendants' from that to Birmingham, the plaintiff's drover signed a way-bill containing the following condition: "For the convenience of the owner the company will receive the charges payable to other companies for conveyance of the cattle over their line of railway, but the company will not be subject to liability for any loss, delay, default, or damage arising on such other railway." One sum was charged for the carriage, which was to be paid at Birmingham. The oxen were placed in trucks belonging to the defendants, and on the arrival of the train at Wolverhampton, on defendants' line, it was found that the bottom of one of the trucks was broken, and one of the oxen * dead and others injured. It was held that the contract was so exclusively with the Shrewsbury and Hereford Company for the entire journey that the defendants were not liable.

2. But this rule has been very seriously questioned in this country. The general view of the American courts upon this subject is, that in the absence of special contract, the rule laid down in the earlier English cases,⁸ that the carrier is only liable for the extent of his own route, and for the safe storage and delivery to the next carrier, is the more just and reasonable one; and this is the doctrine which seems likely to prevail in this country, although there is no doubt some argument to be drawn from convenience in favor of the English rule.⁹ (b)

⁷ *Coxon v. Great Western Railway Co.*, 5 H. & N. 274.

⁸ *Garside v. Trent & Mersey Navigation Co.*, 4 T. R. 531.

⁹ *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 16 Vt. 52; 18 Vt. 131; 23 Vt. 186; s. c. 2 Redf. Am. Railw. Cas. 52; *Van Santvoord v. St. John*, 6 Hill, N. Y. 158; *Hood v. New York & New Haven Railroad Co.*, 22 Conn. 1; s. c. 22 Conn. 502; *Nutting v. Connecticut River Railroad Co.*, 1 Gray, 502; *Jenneson v. Camden & Amboy Railroad Co.*, 4 Am.

(b) A carrier receiving goods for line is not bound, in the absence of carriage to a point beyond its own contract, beyond its own line. Detroit

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* 3. There are many cases, where the American courts have held the carrier liable beyond the limits of his own route, upon

Law Reg. 234. STROUD, J., in the last-named case, reviews all the cases, and concludes, that in this country the courts have held, that when goods are delivered to a carrier marked for a particular place, but unaccompanied by any other directions for their transportation and delivery, except such as might be inferred from the marks themselves, the carrier is bound only to transport and deliver them, according to the established usage of the business in which he is engaged, whether that usage were known to the other party or not.

In *United States Express Co. v. Rush*, 24 Ind. 403, the defendants received a package of money to be carried to a point beyond their route. They carried it to the point on their route nearest the point of destination, and delivered it to another express, the usual communication from that point to the place of destination, and the package was lost while in its custody. The defendants' receipt for the package specified that it undertook to forward the package to the point nearest its destination reached by that company, and that it should be held liable as forwarders only. It was held that the defendants might become liable as common carriers without compliance with the statute declaring express companies common carriers, but that having done all which its contract required it was not responsible further. Where a ticket, sold by a railway company to a point on a connecting road, contains a printed stipulation that in selling the company acts as agent only for roads beyond the terminus of its own, and assumes no responsibility therefor, the company is not liable to a passenger for the loss of baggage not occurring on the line of

& *Bay City Railway Co. v. McKenzie*, 9 Am. & Eng. Railw. Cas. 15; *Michigan Central Railroad Co. v. Myrick*, 9 Am. & Eng. Railw. Cas. 25; *Irwin v. New York Central & Hudson River Railroad Co.*, 59 N. Y. 653; *Erie Railway Co. v. Wilcox*, 84 Ill. 239; *Piedmont Manufacturing Co. v. Columbia & Greenville Railroad Co.*, 19 S. C. 353; *Myrick v. Michigan Central Railroad Co.*, 107 U. S. 102. Such receipt does not import a contract to deliver at destination. *Erie Railway Co. v. Wilcox*, 84 Ill. 239; *Crawford v. Southern Railroad Association*, 51 Miss. 222; *Phillips v. North Carolina Railroad Co.*, 78 N. C. 294. But *contra*, *Mulligan v. Illinois Central Railway Co.*, 36 Iowa, 181, where it is held that the receipt of goods

marked to a destination beyond creates *prima facie* a contract to carry to such destination, but that it may be modified by proof of a different usage known to the shipper. And see *Halliday v. St. Louis, Kansas City, & Northern Railway Co.*, 74 Mo. 159; *Louisville & Nashville Railroad Co. v. Weaver*, 9 Lea Tenn. 218.

Nor is such a contract implied from the receipt of freight charges for the entire distance. *Myrick v. Michigan Central Railroad Co.*, *supra*.

As a result of this general doctrine, a carrier may lawfully stipulate that it shall not be liable beyond its own line. *Mulligan v. Illinois Central Railway Co.*, 36 Iowa, 181. See *supra*, note (a).

the *ground of a special undertaking, either express or implied, (c) but whether any such contract exists is regarded as a matter to be *determined from all the facts and attending circumstances of the case, and will more generally be an inference for the jury than the court, unless it depends upon the effect of written stipulations, and even then will often be affected more or less by attending facts and circumstances.¹⁰

its own road. *Pennsylvania Central Railroad Co. v. Schwarzenberger*, 45 Penn. St. 208. See also *Hunt v. New York & Erie Railway Co.*, 1 Hilton, 228; *Dillon v. Same*, 1 Hilton, 231. In the case of *Converse v. Norwich & New York Transportation Co.*, 33 Conn. 166, where the defendant received goods for transportation beyond its own line, which was confined to the water, the goods being addressed to S., and receipted by the defendant as "goods bound for S.," that point being reached by railway, after the termination of defendant's line, there being a usage known to the shipper to carry through freight at reduced prices, by virtue of an arrangement for that purpose between the defendant and the railway company, and the proceeds divided between the two companies in certain proportions, a bill for the through freight being made out and collected and receipted for by the railway company, at the place of delivery, it was decided that as there was no unexplained evidence that the defendant held itself out as carrier throughout the entire line to S., and no express contract to carry to S., the defendant's contract was performed on delivery to the railway company. But in *Peet v. Chicago & Northwestern Railway Co.*, 19 Wis. 118, where the defendant, whose line terminated at Chicago, receipted for one hundred barrels of flour at Neenah, on its own line, "contract from Neenah to New York at \$2.25 per barrel," it was held that the contract was to deliver the flour in New York, and the company was responsible as common carriers for the entire route. And where separate companies are engaged in a common undertaking for the transportation of freight over a long line, of which each associate forms a link, giving through bills of lading and charging through freight, each will be liable as a common carrier for the whole distance. *Cincinnati, Hamilton, & Dayton Railroad Co. v. Spratt*, 2 Duvall, 4. But where the receipt or bill of lading contains express notice that the first company will not be responsible as carrier beyond its own line, the fact that it extends to the entire route will not render it responsible as a common carrier beyond its own limits. *Detroit & Milwaukee Railroad Co. v. Farmers' Bank*, 20 Wis. 122.

¹⁰ *Weed v. Saratoga & Schenectady Railroad Co.*, 19 Wend. 534; *Bennett*

(c) In the absence of charter or other statutory provision to the contrary, a carrier may by special contract bind himself for carriage beyond his own lines and beyond the state in which the road lies. *Phillips v. North Carolina Railroad Co.*, 78 N. C. 294. *Bryan v. Memphis & Paducah Railroad Co.*, 11 Bush, 597. Such a contract may not be made by an ordinary station agent, but may be by the general freight agent. *Grover & Baker Sewing Machine Co. v. Missouri Pacific Railway Co.*, 70 Mo. 672.

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4. The American cases upon the subject, with rare exceptions, recognize the right of a railway company to enter into special

v. Filyaw, 1 Fla. 403. The Laurens Railroad Co. gave receipts for cotton "to be delivered on presentation of this receipt at Charleston." The cotton reached the terminus of the Laurens road in safety, and there, without bulk being broken, was delivered in the same cars to the Greenville & Columbia Railroad Co. to be carried on. It was afterwards lost. It was held, that the Laurens Company was liable, its undertaking being special to carry to Charleston. *Kyle v. Laurens Railroad Co.*, 10 Rich. 382. See *Krender v. Woolcott*, 1 Hilton, 223; *Illinois Central Railroad Co. v. Copeland*, 24 Ill. 332; *Same v. Johnson*, 34 Ill. 389. Where the carrier charges for the delivery of goods at a point beyond his own line, he will be held responsible, as carrier, to that point. *Baltimore & Ohio Railroad Co. v. Green*, 25 Md. 72. And where the carrier receives and receipts goods to be transported beyond his own line, he *prima facie* becomes responsible for the transportation to the point of destination; and if the goods are lost beyond his own route he will be liable for them, and the other company is not responsible to the owner. *Southern Express Co. v. Shea*, 38 Ga. 519; *Coates v. United States Express Co.*, 45 Mo. 238; *Cincinnati, Hamilton, & Dayton Railroad Co. v. Pontius*, 19 Ohio St. 221; *Toledo, Peoria, & Warsaw Railroad Co. v. Merriman*, 52 Ill. 123. And in *Illinois Central Railroad Co. v. Frankenberg*, 54 Ill. 88, the court seem to come very nearly upon the ground of the English cases. But where the contract for transportation from New York to Macon, Ga., was made between the plaintiff and Adams Express Co., and the loss occurred while the goods were in the possession of the Southern Express Co. as the agents of the original contractors to complete the transportation, it was held that the action could be maintained only against the party contracting. *Southern Express Co. v. Shea*, *supra*. This case seems to have adopted the English rule throughout. This question of the extent of the responsibility of the first carrier, who receives goods addressed to some point beyond his own route, is causing constant discussion in the courts, the result of which seems to be, that there is no clearly settled rule in the American courts, but each case stands on its own circumstances. The Massachusetts courts seem to maintain the extreme of the American rule, that no implication of an undertaking to carry beyond the line of the first carrier arises, either from the goods being marked for a more distant point, or from their being receipted for by the first carrier and the entire freight paid to and accepted by him. *Gass v. New York, Providence, & Boston Railroad Co.*, 99 Mass. 220; *Burroughs v. Norwich & Worcester Railroad Co.*, 100 Mass. 26. It has not yet been held, in Massachusetts even, that no amount of circumstantial evidence attending the receipt and despatch of the goods will bind the first carrier to the end of the line. But such is the tendency of the reasoning in most of the late cases there, unless where the evidence amounts to an express contract. But in some of the other states it seems to be considered that, where the course of business on the line, or the manner of receiving and despatching the goods, is calculated to impress the owner with the expectation that he may look to the

contracts to carry goods beyond the line of their own road. And where different roads are united in one continuous route, such an undertaking, in regard to merchandise received and booked for any point upon the line of the connected companies, is almost matter of course. It is, we think, the more general understanding upon the subject, among business men and railways, their agents and servants.¹¹ (*d*) And this is so, although the connec-

particular carrier with whom he contracts to perform the entire contract for the transportation, such will be held to be the legal implication. Of cases in this class, those in the New Hampshire courts seem of late to have taken the lead. *Nashua Lock Co. v. Worcester & Nashua Railroad Co.*, 48 N. H. 339; s. c. 10 Am. Law Reg. n. s. 244; s. c. 2 Redf. Am. Railw. Cas. 290; *Barter v. Wheeler*, 49 N. H. 9. See also *Illinois Central Railroad Co. v. Frankenberg*, 54 Ill. 88. And in *Hill Manufacturing Co. v. Boston & Lowell Railroad Co.*, 104 Mass. 122, where the case was before the court on an agreed state of facts with power to draw such inferences as a jury might, it was held, where the defendants made an arrangement with the next railway, on a line extending over three railways and one steamboat line, from Lowell to New York, by which the defendants were to receive goods and bill through, and receive the entire freight, or leave it to be collected at the end of the route, the freight to be divided among the several companies in a stipulated manner, the second company agreeing to indemnify the defendants against all claims for loss or damage in the transportation beyond its own line; and where by further contract between the second company and the last three companies the arrangements already stated were assented to, and the defendants accepted goods marked for New York, gave way-bills for the entire distance, took pay for transportation over the whole line and forwarded the same accordingly, — that all this, with the natural presumptions therefrom arising, must be regarded as amounting to a contract to carry to New York, and that the defendants were responsible accordingly. This case is not essentially different from those before cited from New Hampshire. The Pennsylvania case of *Pennsylvania Railroad Co. v. Berry*, 68 Penn. St. 272, holds that common carriers may by special contract bind themselves to carry beyond their own line; but that, as this is out of the common course, the proof of the contract should be clear and satisfactory, which is much the same as the Massachusetts rule finally settled.

¹¹ *Noyes v. Rutland & Burlington Railroad Co.*, 27 Vt. 110; s. c. 2 Redf. Am. Railw. Cas. 150; *Wilcox v. Parmelee*, 3 Sandf. 610; *Ackley v. Kellogg*, 8 Cow. 223. Editors' note 4, Am. Law Reg., 238, *et seq.*, where this subject is very elaborately and satisfactorily discussed. See *Bradford v. South Carolina Railroad Co.*, 7 Rich. 201; *Mercantile Mutual Insurance Co. v. Chase*, 1 E. D. Smith, 115; *Mallory v. Bennett*, 1 E. D. Smith, 234.

In *Collins v. Bristol & Exeter Railway Co.*, 11 Exch. 790; s. c. 36 Eng. L.

(*d*) Such a contract is presumed in the case of the so-called transportation companies, fast freight lines, &c , formed of companies owning various

tion among *such roads is only temporary, and merely incidental, for the convenience of transacting business, one road acting sometimes as agent for other roads, by their procurement or adoption.¹²

& Eq. 482, a carrier of goods had intrusted them to the Great Western Railway Co., to be carried from Bath to Torquay. To accomplish the transit, the goods must pass over three railways, that of the defendant being one. The goods were burned on its lines. The receipt-note, or bill of lading, given by the Great Western Railway, specified that the company was not to be answerable for loss by fire. The carriage for the whole distance was paid to the Great Western Railway. It was held that there was a contract by the Great Western Company to carry the goods the whole way to Torquay. The judgment was reversed in the Exchequer Chamber, 1 H. & N. 517; 28 Law T. 260; s. c. 38 Eng. L. & Eq. 593; but in the House of Lords it was held that the judgment of the Court of Exchequer was right, and ought to have been affirmed. 5 H. & N. 969; 5 Jur. n. s. 1367.

¹² *Wibert v. New York & Erie Railway Co.*, 12 N. Y. 245, 255, where HAND, J., said that "in many cases in which different railroad corporations cannot be considered by the public strictly as partners, they may and often do act as agents for each other."

See also *Nutting v. Connecticut River Railroad Co.*, 1 Gray, 502, and *Elmore v. Naugatuck Railroad Co.*, 23 Conn. 457. One company, chartering one of its boats to another company for a single trip, but retaining the charge of it and of navigating it, was held liable to a passenger for the loss of his baggage. *Campbell v. Perkins*, 4 Seld. 430. In *Foy v. Troy & Boston Railroad Co.*, 24 Barb. 382, it was held, that where goods were received by defendants at Troy, consigned to a person at Burlington, Vt., it would be understood, in the absence of any proof to the contrary, as an undertaking to deliver the goods in the same condition as when received at the place of destination. And it was said that where property was so consigned, and was to pass over more than one road, it was not the duty of the owner, in case of injury to his goods, to inquire how many different companies made up the line between the place of shipment and the place of delivery, or to determine, at his peril, which company was liable for the injury. It was also said that if the company receiving freight for transportation desired to limit its responsibility to injuries occurring on its own road, it should provide for such limitation in its contract. In *Willey v. West Cornwall Railway Co.*, 30 Law T.

connecting lines. The receiving company becomes responsible for the default of any of the associated roads. *Wyman v. Chicago & Alton Railroad Co.*, 4 Mo. Ap. 35. No special contract need be shown. *Phillips v. North Carolina Railroad Co.*, 78 N. C. 294. Carriers so associated may be jointly liable. *Barrett v. Indianapolis & St. Louis Railroad Co.*, 9 Mo. Ap. 226; *Block v. Erie, & North Shore Despatch Fast Freight Line*, 21 Am. & Eng. Railw. Cas. 1. Or liable severally. *Rice v. Indianapolis & St. Louis Railroad Co.*, 3 Mo. Ap. 27; *Block v. Erie & North Shore Despatch Fast Freight Line*, 21 Am. & Eng. Railw. Cas. 1.

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And if * it be the usual course of the carrier's business to forward goods beyond his route by sailing vessels, he is not liable for not forwarding * a particular article by steam-vessel, unless the direction to do so be clear and unambiguous.¹³

5. In one case in the Court of Exchequer,¹⁴ the plaintiff sent a parcel to "Reynolds, Plymouth," by defendants, who took it to the end of their route, and then passed it on by another railway, as their agents, to the house of Reynolds, and demanded 2s. 3d. for its carriage. Payment of this sum was refused, and 1s. 6d. only offered. On the morning of the next day the parcel was returned to London, and on that day the consignee sent to pay the 2s. 3d. under protest, and obtain the parcel. He then made search for it in London and elsewhere, but it could not be found, and he brought this action for a conversion. The jury found a tender of the 2s. 3d. and a demand of the parcel, in a reasonable time, and that the parcel was returned to London before a reasonable time, and a consequent conversion. It was held that the facts justified the finding.

6. Express companies have generally been held responsible only * for the transportation to the end of their own line, and careful delivery to the next company upon the route most direct to the destination of the parcel, with proper directions to the carriers to whom the parcel is successively delivered. And it has

261, the same propositions, with the exception of the one last ruled, were maintained. It was also said, that the company is as much bound by a contract to carry beyond its own route, where the transportation is partly by water, as if it were all by rail, and that the company cannot defend on the ground that a contract to carry beyond its own route is *ultra vires*.

¹³ *Simkins v. Norwich & New London Steamboat Co.*, 11 Cush. 102.

¹⁴ *Crouch v. Great Western Railway Co.*, 2 H. & N. 491. It is here held, that if a carrier contracts to carry goods to, and deliver them at a particular place, his duty at that place is precisely the same, whether his own conveyance goes the entire way, or stops short at an intermediate place, and the goods are conveyed by another carrier; and the carrier, or his clerk, at the place of destination, is the agent of the original carrier for all purposes connected with the conveyance and delivery and dealing with the goods, as his own clerk would have been at the place where his own conveyance stops. *Supra*, § 175, pl. 17.

BRAMWELL, B., who dissented from the decision in this case, says, in regard to the case of *Scotthorn v. South Staffordshire Railway Co.*, 8 Exch. 341, *infra*, § 182, "I reserve to myself the right to question its correctness on a fitting occasion."

been said that where the goods, in such cases, are delivered to the carrier, marked for a particular destination, without any specific instructions in regard to the transportation more than what is to be inferred from the marks on the package, the carrier is only bound to transport and deliver them according to the established usage of the business, whether that be known to the consignor or not. Consequently, where goods were sent from Detroit, by an express company, to New York, and came into the hands of the defendants' agents at Suspension Bridge, and were carried to Albany and delivered to the Hudson River Railway, common carriers between that city and New York, giving proper instructions to the latter company, it was held that defendants were thereby exonerated from further responsibility.¹⁵ (e)

7. Where special directions are given to a carrier in regard to the delivery of the goods, they must be followed, and if so, the

¹⁵ *Hempstead v. New York Central Railroad Co.*, 28 Barb. 485. And in *McDonald v. Western Railroad Co.*, 34 N. Y. 497, the rule is said to be this: Where goods must pass through the hands of several carriers before reaching their destination, it is the duty of each to carry to the end of his own route, and, except the last, to deliver to the next carrier, and he will not excuse himself from responsibility by putting the goods in warehouse without any effort to have them go forward to their ultimate destination. And it is the duty of the owner of the goods to have them properly marked, and to present them to the carrier or his proper servants for that purpose to have them properly booked, and if by his neglect in this respect a wrong delivery and consequent loss occurs, without the fault of the carrier, the owner must bear the loss. But if the wrong delivery, even in such case, is the fault of the carrier, he is responsible, and cannot urge the default of the owner in defence, if notwithstanding that he might have avoided the loss by proper diligence on his part. *The Huntress, Davies*, 82. And where, goods being consigned beyond the first carrier's line, on their arrival at the termination of its line, the second carrier called for them, but the first carrier not being then ready to attend to the delivery, it was arranged, for the convenience of the parties, that the goods should remain in warehouse until the next morning, and in the mean time they were destroyed by fire, it was held, that the first carrier's responsibility continued until actual delivery to the next carrier. *Fenner v. Buffalo & State Line Railroad Co.*, 46 Barb. 103.

(e) Where the receiving carrier stipulates that in sending forward the goods beyond the terminus of its road it shall act as agent of the consignor and not as carrier, it is nevertheless bound to give correct information as to destination, &c., to the succeeding carrier. *Dana v. New York Central & Hudson River Railroad Co.*, 50 How. Pr. 428.

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carrier is exonerated from further responsibility. And where the company according to the usages of the business receive instructions as to goods * to be carried beyond their own route, and the instructions are not obeyed, the carrier is liable for any loss or damage.¹⁶

8. And it makes no difference, as we have seen, that portions of the route are by steamboat and other portions by land where no railway exists. The English courts infer a contract to carry through.¹⁷ And in such cases, where there is an agreement between the railway and steamboat lines to run in connection and divide the through freights, it was held both companies are jointly liable for the entire route.¹⁸

9. Where a package was delivered to the agent of two connecting lines forming a continuous route, and the package was addressed to a person at the end of the route, and the agent altered the address so as to make it more obvious what course it was to be carried, as by writing "via Stafford" upon it, and delivered it to the first company on the route, it was held to be evidence of a contract by that company to carry the entire route.¹⁹

10. The American rule in regard to an implied contract for the entire route seems to be, that where the freight for the entire route is reckoned in one sum, and a receipt given for the entire route, it will be regarded as *prima facie* evidence of an undertaking for the delivery at the ultimate destination of the goods. But this presumption is rebutted by proof, that there is, in fact, no partnership connection between the different companies, but only one of mere agency for the convenience of the business, and that this was known to the consignor, or might have been learned on reasonable inquiry.²⁰ (f)

¹⁶ Michigan Southern & Northern Indiana Railroad Co. v. Day, 20 Ill. 375. And in a later case, Illinois Central Railroad Co. v. Johnson, 34 Ill. 389, it was held, that railway companies, receiving goods marked for places beyond their line, are impliedly bound to see them carried to their destination, according to the English rule before stated. *Supra*, note 11.

¹⁷ Wilby v. West Cornwall Railway Co., 2 H. & N. 702.

¹⁸ Hayes v. South Wales Railway Co., 9 Ir. Com. Law, 474.

¹⁹ Webber v. Great Western Railway Co., 3 H. & C. 771.

²⁰ Angle v. Mississippi & Missouri Railroad Co., 9 Iowa, 487. See also

(f) Washburn & Moen Manufacturing Co. v. Providence & Worcester Railroad Co., 113 Mass. 490.

*SECTION XV.

Power of Company to Contract to carry beyond its own Line.

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| 1. Power not doubted until recently, and still asserted by the cases generally.
2. Effect of receiving goods for points beyond the lines and giving ticket through.
3-5. Consideration of the authorities.
6. Capacity to contract for through carriage may be shown <i>prima facie</i> by acts of company. | 7. English courts hold company competent to contract to carry through entire route by sea and by land.
8. But in general this must be by express contract.
9. A restriction of the carrier's responsibility to that of forwarder not favored. |
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§ 181. 1. It was for many years regarded as perfectly settled law, that a common carrier, which was a corporation chartered for purposes of transportation of goods and passengers between certain points, might enter into a valid contract to carry goods delivered to them for that purpose, beyond their own limits.¹ (a) Most of the American cases do not regard the accepting a parcel, marked for a destination beyond the terminus of the route of the first carrier, as *prima facie* evidence of an undertaking to carry

Morse v. Brainerd, 41 Vt. 550. But in Cutts v. Brainerd, 42 Vt. 566, the court seem to have construed a bill of lading, in the common form for delivering goods on the carrier's own line, the blanks remaining unfilled, as importing a contract to carry the goods to their destination, although beyond the limits of the line, BARRETT, J., dissenting. And in Toledo, Peoria, & Warsaw Railway Co. v. Merriman, 52 Ill. 123, a "through freight contract" with the first carrier on the line, guaranteeing the limit of freight, although stipulating only to carry to the end of the first carrier's line, and to deliver to the next carrier, was held to bind the first carrier throughout the line. But an exception of loss by fire in the first company's receipt, "while in the possession of the railroad company as carriers," was held not to extend to other companies. Camden & Amboy Railroad Co. v. Forsyth, 61 Penn. St. 81. But this is contrary to the general rule in this country.

¹ *Supra*, § 180, and cases there cited; Moore v. Michigan Central Railroad Co., 8 Mich. 23.

(a) Ogdensburg & Lake Champlain Railroad Co. v. Pratt, 22 Wal. 123; Crawford v. Southern Railroad Association, 51 Miss. 222. And see cases *passim* in which the power of a railway company to enter into such contracts is assumed. This, of course, in the absence of charter or other statutory prohibition. Ohio & Mississippi Railroad Co. v. McCarthy, 96 U. S. 258.

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through to that point. But the English cases do so construe the implied duty resulting from the receipt.²

2. But the cases, until a very recent one,³ do hold, that a railway company may assume to carry goods to any point to which their general business extends, whether within or without the particular state or country of their locality.⁴ (b) And it has generally been considered, both in this country and in the English courts, that receiving goods destined beyond the terminus of the particular * railway, and accepting the freight through, and giving a ticket or check through, does import an undertaking to carry through, and that this contract is binding upon the company. (c)

3. The case of *Hood v. the New York and New Haven Railway*,⁵ assumes the distinct proposition that the conductor could not bind the company by such contract, because the company had

² *Supra*, § 180, and notes; *Fairchild v. Slocum*, 19 Wend. 329.

³ *Hood v. New York & New Haven Railroad Co.*, 22 Conn. 502; s. c. 2 Redf. Am. Railw. Cas. 273. The soundness of this case is discussed somewhat in *Converse v. Norwich & New York Transportation Co.*, 38 Conn. 166, 179, 180, by BUTLER, C. J.; and the author of the late Connecticut Digest, Mr. Baldwin, seems to regard the latter case as having overruled the former. See 2 Redf. Am. Railw. Cas. 277, 278. *Elmore v. Naugatuck Railroad Co.*, 23 Conn. 457. And in *Naugatuck Railroad Co. v. Waterbury Button Co.*, 24 Conn. 468, it was held, that a provision in the plaintiff's charter, authorizing them to "make any lawful contract with any other railroad corporation in relation to the business of such road," only extended to contracts for the common use of such other roads as lay within the limits of plaintiff's charter, and that it did not enable the company to enter into a contract to carry freight to the city of New York, either on other railways or on steamboats; that such contract could not be inferred from the course of plaintiff's business; and that having carried the goods to the end of their route and delivered them to the next carrier in the line of their destination, they were no further liable.

⁴ *Supra*, § 180, and notes.

(b) In *King v. Macon & Western Railroad Co.*, 62 Barb. 160, it was held that giving a receipt specifying that the goods were to be transported to destination, a point beyond the defendant's line, bound the defendant to carry through.

(c) The duty to deliver beyond their own lines depends on contract. It is not imposed by law. *Piedmont Manufacturing Co. v. Columbia &*

Greenville Railroad Co., 19 S. C. 353. A contract to carry to destination may be implied from circumstances under which the goods come to the carrier's possession. *Aiken v. Chicago, Burlington, & Quincy Railroad Co.*, 25 Am. & Eng. Railw. Cas. 377. As to what amounts to such a contract, see *Ricketts v. Baltimore & Ohio Railroad Co.*, 61 Barb. 18.

no power to assume any such obligation. The case is not attempted to be maintained upon the basis of authority, but upon first principles, showing therefrom the innate want of authority in the company. It must be admitted the reasoning is specious; so plausible indeed, that if the matter were altogether *res integra*, it might be deemed sound.

4. But it must be remembered that in the construction of all legislative grants, many things have to be taken, by implication, as accessory to the principal thing granted. And if we are not allowed to assume such indispensable incidents as are necessary to the exercise of the powers conferred, in such a manner as to accomplish the main purpose in a reasonable and practicable mode, we shall necessarily be led into inextricable embarrassments. Hence we conclude this case may have assumed, possibly, too narrow grounds, and such as might render the principal grant of the company to become common carriers of freight and passengers from New York to New Haven, less useful to the public, consistently with the security of the company, than the circumstances required. The strict and undeviating requirement in all cases, that all railways shall be restricted in their contracts for transporting persons, parcels, baggage, and goods, to the line of their own road, and a safe delivery to the next carrier, and that nothing like copartnership in the business of a particular route, consisting of different companies, could exist, would certainly be throwing serious hindrances in the way of business, without any adequate advantage.⁴

5. And it was held, in one case by the Supreme Court of Vermont, that railway companies, as common carriers, might make valid contracts to receive freight at, or convey it to, points beyond the limits of their own road, and thus become liable for the acts or neglects of other carriers, not under their control; and that in regard to matters not altogether beyond the general objects of their incorporation, and which, upon a liberal construction, might fairly be considered as embraced within them, it was not * competent for the company to adopt the acts of their agents and officers so long as they proved beneficial, and when they proved otherwise, shield themselves from responsibility, by resorting to a more limited and literal construction of their corporate powers.⁵

⁴ *Noyes v. Rutland & Burlington Railroad Co.*, 27 Vt. 110; s. c. 2 Redf. Am. Railw. Cas. 150. It is there said that "it seems to be now well settled

* 6. And parol evidence that a railway company duly incorporated in one state has held itself out, through its agents, as a common carrier over a railway in another state, is sufficient *prima facie* evidence of its capacity to contract for such carriage, to support an action for merchandise intrusted to it.⁶

7. The English courts hold that it is not *ultra vires* for a railway company to contract to carry beyond its own route, by sea or by land.⁷ And where the party contracted with the company to carry beyond their own line upon a connecting road, but signed a note, without noticing its contents, only extending to the point of departure from the first line, it was held the parol evidence of the extended contract was admissible, as it only supplemented the writing.⁸

8. There seems to be no question entertained by the American courts that railway companies and other transportation companies, either corporations or joint-stock associations, may bind themselves to transport goods or passengers beyond their own lines. But it has generally been considered this must be by express contract.⁹ And in such case it is not material that the first company has no existing arrangement with other connecting lines for transportation beyond its own terminus.⁹ And it has been held, that railway companies may run steamboats beyond their own termini for the purpose of completing the natural transit of freight and travel,¹⁰ and if they do so, and hold themselves out as common

that railway companies, as common carriers, may make valid contracts to carry beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglects of other carriers in no sense under their control." And *Muschamp v. Lancaster & Preston Junction Railway Co.*, 8 M. & W. 421; *Weed v. Saratoga & Schenectady Railroad Co.*, 19 Wend. 534; *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186; s. c. 2 Redf. Am. Railw. Cas. 52, are there relied on. The principle of this case is maintained in *Hart v. Rensselaer & Saratoga Railroad Co.*, 4 Seld. 37; *Schroeder v. Hudson River Railroad Co.*, 5 Duer, 55; *Peet v. Chicago & Northwestern Railroad Co.*, 19 Wis. 118; *Cincinnati, Hamilton, & Dayton Railroad Co. v. Spratt*, 2 Duvall, 4; *Detroit & Milwaukee Railroad Co. v. Farmers' Bank*, 20 Wis. 122; *Angle v. Mississippi & Missouri Railroad Co.*, 9 Iowa, 487.

⁶ *McCluer v. Manchester & Lawrence Railroad Co.*, 13 Gray, 124.

⁷ *Wilby v. West Cornwall Railroad Co.*, 2 H. & N. 703.

⁸ *Malpas v. London & Southwestern Railway Co.*, Law Rep. 1 C. P. 336.

⁹ *Perkins v. Portland, Saco, & Portsmouth Railroad Co.*, 47 Me. 573;

supra, § 180, pl. 2 and note.

¹⁰ *Wheeler v. San Francisco & Alameda Railroad Co.*, 31 Cal. 46; s. c. 2 Redf. Am. Railw. Cas. 278.

carriers of freight and passengers for the entire route, they are bound to receive and carry for all who require it and are ready to comply with the ordinary terms of transportation.¹⁰

9. The courts in this country seem to have considered the claim, sometimes set up by carriers, to insert a provision in their receipts or bills of lading limiting their responsibility to that of forwarders beyond their own line, as not entirely consistent with the soundest policy.¹¹ The duty of carriers beyond their own lines is indeed much the same as that of forwarders, but it admits of no break in full responsibility of a carrier throughout the entire line, while the stipulation to treat the carrier as a mere forwarder seems to recognize such break.

*SECTION XVI.

Authority of the Agents and Servants of the Company.

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| <ol style="list-style-type: none"> 1. Board of directors have same power as company, unless restricted. 2. Other agents and servants cannot bind the company beyond their sphere. 3. Owner may countermand destination of goods through proper agent. 4. But an agent who assumes to bind the company beyond his sphere, cannot. 5. Ratification of former similar contracts, evidence against company. 6. Notice by company of want of authority in servants, renders their acts void. 7. Illustrations of the rule. | <ol style="list-style-type: none"> 8. Servant may bind company even when he disobeys his instructions. 9. Company responsible for the acts of servants of other companies. 10. Authority of the agent not affected by receiving the compensation himself. 11. Extent of agent's authority matter of fact. 12. Owner of ship may be responsible for acts of the master, notwithstanding a charter-party. 13. Station agents have no implied authority to bind the company beyond its own line, <i>sed quare</i>. |
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§ 182. 1. As the entire business of railways is of necessity transacted through the instrumentality of agents, the extent of their authority becomes a serious and important inquiry, as well for the stockholders as the public. As a general rule it may be safely affirmed that the board of directors have all the power which resides in the corporation, subject to such restrictions only as are imposed upon them by the charter and by-laws of the corporation.

¹¹ *Ladue v. Griffith*, 25 N. Y. 364; *supra*, § 169, note 27.

2. The other agents of the company are confined to their several spheres of operation. Thus station agents who receive and forward freight have power to bind the company, by a contract, that the goods shall be forwarded to a point beyond the terminus of the company's road (on the line of another railway), before a particular hour, and this, it would seem, notwithstanding a general notice has been published, that the company would not be responsible for forwarding goods beyond the terminus of their own road.¹ (a) So too, it has been held to be a proper question to submit to the jury, under proper instructions, whether a particular servant or officer, had not, under the circumstances, authority to bind the company.²

* 3. And it would seem, that any one having put goods or baggage upon the company's trains, or into their custody, is at liberty at any time to alter its destination, or resume the custody of it, unless indeed it had been packed with other merchandise where it could not be removed, without unreasonable expense; and the station agent who receives the goods or baggage, is competent to bind the company, by receiving a countermand, or new directions, to which he assents,³ as being in the line of his employment.

¹ *Wilson v. York, Newcastle, & Berwick Railway Co.*, 18 Eng. L. & Eq. 557, in note. This was at Nisi Prius, before JERVIS, C. J. The refusal of the station-master, or of any one to whom he should refer the party, to deliver goods in his custody at the station, will bind the company, and if done without proper excuse, will render it liable in trover. *Rooke v. Midland Railway Co.*, 16 Jur. 1069; s. c. 14 Eng. L. & Eq. 175.

² *Scotthorn v. South Staffordshire Railway Co.*, 8 Exch. 341; s. c. 18 Eng. L. & Eq. 553; *Schroeder v. Hudson River Railway Co.*, 5 Duer, 55. It is often said that railway companies are responsible for the careless and negligent acts, but not for the wilful and criminal acts of their agents. *De Camp v. Mississippi & Missouri Railroad Co.*, 12 Iowa, 348. But the true inquiry is whether the agent was acting within the scope of his employment. If so, his acts bind the company, whether wilful or negligent.

³ *Scotthorn v. South Staffordshire Railway Co.*, *supra*, where MARTIN, B., said: "A carrier is employed, as bailee of another's goods, to obey his directions concerning them; and I have no hesitation in saying, that generally, at any period of the transit, he may have them back. I think that if a traveller by railway is dissatisfied with his mode of travelling, he may at any point stop and require that his luggage should be delivered up to him. The station clerk had power to receive the countermand; and a loss having ensued from

(a) But see *contra*, *Grover & Baker Sewing Machine Co. v. Missouri Pacific Railway Co.*, 70 Mo. 672.

His assent and promise to execute the order may be regarded as evidence tending to show that the order was given to the proper person.

4. But where an agent of a railway company assumes to make a contract, in relation to the business of the company, beyond the line of his ordinary employment, and especially where it is in contravention of the common course of the business of the company, or of their published rules and regulations, it will not bind the company.⁴ Thus it was held that a surgeon, who amputated the * limb of a passenger, who was injured by the moving of a truck upon the railway, and the station agent had directed that "every attention" should be paid to such person, in consequence of which the surgeon performed the operation, could not recover of the company for his services, on the ground that it was not incident to the employment of such agent to bind the company by such contract.⁵

an omission to comply with that countermand, the defendants are bound to make that loss good." So where goods, carried by one company, arrived at the station of another company, the place of their destination, but that company refused to deliver them to the owner, he offering to pay all charges, on the ground that their contract with the other company, to deliver goods for them, did not include this class, and that they should therefore require the goods to be taken back on the line of the other company, it was held to be a conversion. *Rooke v. Midland Railway Co.*, 16 Jur. 1069; s. c. 14 Eng. L. & Eq. 175.

⁴ *Elkins v. Boston & Maine Railroad Co.*, 3 Fost. N. H. 275. In this case the defendants' ticket master and station agent received some parcels of goods of the plaintiff, and promised to forward them by the next passenger train, and the goods were lost. The plaintiff proved that in two instances, in the two years preceding, goods had been forwarded by the passenger trains, under the charge of some of defendants' servants, but it did not appear that freight was paid the company, or that the company in any other way assented to it. See also *Norwich & Worcester Railroad Co. v. Cahill*, 18 Conn. 484, where it is held that the declaration of a director is good evidence of contract to bind the company. But testimony of this character is of almost infinite variety, and much of it, as in the case first cited in this note, too remote to be of much value. To bind the company, the testimony should show a usage or continuous practice.

⁵ *Cox v. Midland Counties Railway Co.*, 8 Exch. 268; *Stephenson v. New York & Harlem Railroad Co.*, 2 Duer, 341. But in the recent case of *Langan v. Great Western Railway Co.*, 26 Law T. Rep. 577, it was held that a railway inspector, whose duty it was to look after the sufferers on the line from accidents, had authority to pledge the credit of the company to an innkeeper for necessities furnished such persons. But see *infra*, § 182, pl. 13.

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5. But the fact that the company had ratified similar contracts, made by this same agent, might be evidence tending to show, that they had given this particular servant authority to make such, or similar contracts, but not that they had given authority to all their servants to do so.⁵ (b)

6. If the company give notice that they will not be bound by the delivery of goods, "unless they were signed for by their clerks or agents," and this is known to the plaintiff, the company are not bound by a delivery in a different mode.⁶ But where the general freight agent was, by the by-laws of the company, intrusted with the power to negotiate contracts for the transportation of freight, with the approval of the president, it was held that this imported nothing more than that the president of the company might interfere to control the agent in making contracts, whenever he chose, but that unless he did so interfere, and neglected to apprise the public that all contracts for the transportation of freight must be ratified by him, the company would be bound by the acts of the agent.⁷

⁵ *Slim v. Great Northern Railway Co.*, 14 C. B. 647; s. c. 26 Eng. L. & Eq. 297. The authority of the agent to bind the carrier is always a question of fact, dependent on the attending circumstances and the course of business. *Thomson v. Wells*, 18 Barb. 500.

⁷ *Medbury v. New York & Erie Railroad Co.*, 26 Barb. 564. The company's agents cannot make admissions affecting its interests, except during the progress of their acts and as part of the transaction. *Fletcher v. Boston & Maine Railroad Co.*, 1 Allen, 9. So also of an agent along the line of a railway as a night-watch, who, some days after cattle had been delayed, said he had forgotten the cattle, it was held not binding on the company, and on most unquestionable grounds. *Great Western Railroad Co. v. Willis*, 18 C. B. n. s. 748.

(b) A corporation may repudiate a contract entered into by an agent without authority. *Pittsburg & Steubenville Railroad Co. v. Allegheny County*, 79 Penn. St. 210. But where one has recognized another as his agent by adopting and ratifying his acts, he cannot repudiate the relation to the injury of third persons who have relied on it. *Summerville v. Hannibal & St. Joseph Railroad Co.*, 62 Mo. 391. And in any case, election to repudiate

must be made in a reasonable time. *United States Rolling Stock Co. v. Atlantic & Great Western Railroad Co.*, 34 Ohio St. 450. As to what will amount to a ratification, see *Katzenstein v. Raleigh & Gaston Railroad Co.*, 84 N. C. 688; *Dunn v. Hartford & Wethersfield Railroad Co.*, 43 Conn. 434; *Rockford, Rock Island, & St. Louis Railroad Co. v. Wilcox*, 66 Ill. 417.

* 7. But where trees were carried upon the company's trains, and the owner obtained leave to set them temporarily in the company's grounds, by permission of the station clerk, or of the general superintendent of the company, and both these persons subsequently refused to let the owner take them away, whereupon he applied to the managing director of the company, who also refused, and he brought trover against the company, the Court of Exchequer Chamber held it would lie.⁸ But where the servant of the company arrests a passenger for not paying fare, the company are not liable.⁹

8. And it makes no difference, in regard to binding the company, that the agent disobeyed the direction of his superior, if he was acting within the scope of his employment at the time.¹⁰

9. And in the case of a common carrier of goods, he is liable for the acts of all the servants of his sub-contractor.¹¹ (c)

10. And it will make no difference in regard to the responsibility of the carrier for the acts of his servants, that the emoluments derived from the particular transportation were, by

⁸ *Taff Vale Railway Co. v. Giles*, 2 E. & B. 822; s. c. 22 Eng. L. & Eq. 202. The courts say, "It is the duty of the company to have some person clothed with discretion, to meet any exigency that may arise, and to grant any reasonable demand."

⁹ *Eastern Counties Railway Co. v. Broom*, 6 Exch. 814; s. c. 6 Railw. Cas. 743; *Roe v. Birkenhead Railway Co.*, 7 Exch. 36; s. c. 6 Railw. Cas. 795.

¹⁰ *Philadelphia & Reading Railroad Co. v. Derby*, 14 How. U. S. 468, 488. Nor will it excuse the company from liability because the disregard of duty on the part of the agent was wilful. *Weed v. Panama Railroad Co.*, 5 Duer, 193. So where a clerk having charge of the receiving of freight, at a wharf, informs the owner of goods that one rate exists, when he had been instructed to demand a higher rate, it will bind the principal to the rate named. *Winkfield v. Packington*, 2 C. & P. 599.

¹¹ *Machu v. London & Southwestern Railroad Co.*, 2 Exch. 415; s. c. 5 Railw. Cas. 302. This case was where the company employed an agent to deliver parcels in London. The company had been accustomed to send a delivery ticket, with each parcel, which was headed with the name of the company, and signed by the party employed by the company to make the delivery, and contained the names of the porters of that party. One of the porters stole the parcel in this case. It was held, that the porter was to be regarded as the servant of the company, within the meaning of the Carriers' Act.

(c) But if a shipper employ a station agent as his agent, he cannot hold the company for his acts in the same matter. *Sumner v. Charlotte, Columbia, & Augusta Railroad Co.*, 78 N. C. 289.

arrangement * between the carrier and the servants, allowed to be retained by the servants, as part of their compensation; unless this were known to the owner of the goods and he contracts with the servants, as principals.¹²

11. The authority of the servants of a carrier is a question of fact to be determined by the jury, and the burden of proof rests upon the party claiming such authority.¹³ A mere messenger having charge of property sent by express is not necessarily authorized to make contracts to receive freight.¹²

12. The owner of a vessel is not exonerated from responsibility for the acts of the master, on account of the existence of a charter-party, by which the charterers assume the responsibility of the voyage, so long as the owners remain in possession of the ship by their servants, the master and crew. And those who ship goods upon such vessel without knowing of the existence of the charter-party, may look to the owner to safely stow or pack the goods; and the fact that the charterers employed a stevedore to stow these particular goods will make no difference, the owner of the goods not being aware of such fact.¹⁴

13. In a recent case,¹⁵ where the defendants' line connected with a steamboat route, the officers of the company supplied blanks to their station agents to receipt for goods to be transported from their stations to points on the connecting route, in a form which expressly provided that the goods should be transported by the railway to the end of its own route, and thence by the steamboat corporation; and that in case of loss or damage of the goods, that company alone should be responsible in whose custody the goods were at the time the loss occurred. But instead of using one of these blanks, one of the station agents, without the knowledge of the officers of the company, or any authority from them, was accustomed to give a person who shipped goods from time to time from that station to points on the connecting route, receipts upon blanks furnished by the shipper, pur-

¹² *Bean v. Sturtevant*, 8 N. H. 146. See *Sheldon v. Robinson*, 7 N. H. 157; *McLane v. Sharpe*, 2 Harring. Del. 481.

¹³ *Thurman v. Wells*, 18 Barb. 500.

¹⁴ *Sandeman v. Scurr*, Law Rep. 2 Q. B. 86. *Quære*, whether the charterers may not also be held responsible under the bills of lading signed by the master in furtherance of the charter-party.

¹⁵ *Burrongs v. Boston & Worcester Railroad Co.*, 100 Mass. 26.

porting to bind the railway company to deliver the goods at the points of destination; the court held the company not bound as a common carrier beyond the extent of its own line. The court here say that the English cases, in which a station agent has been allowed to make binding contracts on the part of the company to carry beyond the limits of its own line, are of no weight here, since the English rule of law, upon that point, is not like the rule in this country. But it seems questionable, upon the general principles of the law of agency, how far an agent, intrusted with authority to receive goods, and to contract for their transportation across a connecting line, can legally be so limited in regard to the mode of exercising such authority, as to exonerate the company from the force of the terms of his stipulations in regard to transportation, which are common and natural in themselves, upon the ground of special restrictions upon the agent's authority or mode of doing the business, unless there was some evidence to show that the other party was cognizant of these restrictions.¹⁶ (d) If the agent were a special one, that rule might obtain. But station agents are general agents within the range of their business. It has recently been decided by the Queen's Bench in England, according to newspaper and magazine reports, and very justly, it seems to us, that the employés of the company, when an accident occurs and passengers are injured, have from necessity authority to bind the company for securing immediate relief.¹⁷

¹⁶ *Supra*, pl. 2, note 2.

¹⁷ *Supra*, pl. 4, note 5.

(d) *Supra*, note (a).

SECTION XVII.

Limitation of Duty, by Course of Business.

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| <ol style="list-style-type: none"> 1. Carriers bound only to the extent of their usage and course of business. 2. This question arises only when they refuse so to carry. 3. Carriers are bound to serve all who apply. 4. Duty under English Carriers' Act. 5. Usage may be resorted to to determine ratable character of goods. 6. Carrier by water cannot transship except in cases of strict necessity. | <ol style="list-style-type: none"> 7. Proof of the ordinary results of like voyage admissible. 8. So also is the notoriety of the usages of trade and business. 9. Goods not removed within a reasonable time, carrier responsible only for actual negligence. 10. Carrier bound, how far, to observe the usages of the port. |
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§ 183. 1. It seems to be an admitted principle in the law of carriers, that their obligations and duties may be restricted by the * course of their business. (a) They may limit it to the carrying of particular commodities. The business of common carriers is not one imposed upon any particular person, natural or artificial, and any one may undertake it, at will, and by consequence may enter upon so much of the entire business as he chooses.¹ In the absence of any special contract, the obligation of a carrier of goods is to carry them by the usual route professed by him to the public, and to deliver them within a reasonable time.² And

¹ *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186; s. c. 2 Redf. Am. Railw. Cas. 52. Opinion of DANIEL, J., in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; s. c. 2 Redf. Am. Railw. Cas. 34. If any illustration or authority were needful on this point, it might very readily occur to any one reflecting on the subject. An express company is no doubt liable as a common carrier, but it is not compellable to carry such articles as are never expected to be sent or carried by express, as, for instance, articles of great bulk and weight. It would certainly be a novelty to require an express company to transport coal, salt, iron and lead in pigs, &c. But practically, no doubt, the increased price of this mode of transportation will protect the companies from these extraordinary demands, and they have the right also to demand the protection of the law as well as other persons from liability to such intrusion.

² *Hales v. London & Northwestern Railway Co.*, 4 B. & S. 66.

(a) It has been held, however, that such is the usage. *Baltimore & Ohio Railroad Co. v. Adams Express Co.*, 18 Am. & Eng. Railw. Cas. 586.

there is no obligation upon a railway company to carry goods otherwise than according to their public profession.³

2. But this distinction is of no practical importance, except where carriers refuse to carry certain kinds of goods, or to carry them except upon certain conditions excusing their general common-law responsibility, and suit is brought for the refusal. In such cases it is believed the carrier is not liable for an absolute refusal to carry goods wholly out of the range of his ordinary business, unless where the carrier is a corporation chartered, with the powers, and for the purpose, of becoming common carriers in general, and in such cases even, it seems the better opinion, that unless restrained by the express terms of their charter, such companies have the same liberty, as to the extent of their business, as natural persons.⁴ In this last case the language of PARKE, B., is pertinent. "The question is whether the defendants are, under the circumstances of this case, bound to carry coals from Milton to Oakham. If they are merely in the situation of carriers, at common law, they are not bound, for they have never professed to * carry coals from or to those places. At common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession." He then cites at length the words of HOLT, C. J., in *Lane v. Cotton*,⁵ in regard to the general duty of all who undertake to serve the public in any particular business to serve all who come, citing the cases of blacksmiths,⁶ innkeepers,⁶ and common carriers. (b)

* *Oxlade v. Northeastern Railway Co.*, 15 C. B. N. S. 680. And although generally, where an unusual press of business occurs on a railway, so that freight accumulates, it will be expected the company will carry that first which comes first, it has been held that this cannot be enforced as a universal rule; but that the carrier may and ought to have regard to the condition of the goods and the liability they are exposed to of suffering loss or damage by delay in transportation. *Peet v. Chicago & Northwestern Railway Co.*, 20 Wis. 594; *supra*, 176, pl. 6, and note.

⁴ *Johnston v. Midland Railway Co.*, 4 Exch. 367; s. c. 6 Railw. Cas. 61; *Sewall v. Allen*, 6 Wend. 335; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16.

⁵ *Keilway*, 50, pl. 4, cited in note to *Lane v. Cotton*, 12 Mod. 484, and in note to *Parsons v. Gingell*, 4 C. B. 545.

⁶ *Dyer*, 158, Godb. 346. But it seems to be conceded by the learned Baron

(b) See *supra*, § 176.

3. In the case of an innkeeper there is no question that the action will lie. So also in the case of a carrier, and that arises from the public profession which he has made. A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places.

4. In regard to the effect of the act of parliament, the learned judge says: "I think that no obligation is cast upon the company to undertake the duties of carriers altogether, and on every part of their line, but that they may carry some goods on one part of the line and not on others." That act in terms enabled that company to become carriers, but did not oblige them to do so. Hence it is said, "They are not bound to carry to or from each place on the line, or every description of goods."⁷

5. Evidence of the prevailing usage among manufacturers, dealers, * and carriers, may be resorted to for the purpose of determining whether sawed marble, in slabs, is to be rated as unwrought marble.⁸

6. Carriers by steamboat are not justified in the transshipment of freight except in cases of strict necessity, and if done except in such case, it will subject the carrier to responsibility for the subsequent loss of the freight upon the vessel to which it is transferred. The mere fact that a steamboat upon an inland river is grounded, from which she might relieve herself, with safety and

here, that the instance which he cites of the smith being bound to shoe all the horses of the realm which come to him, is at least rendered questionable by the note to *Parsons v. Gingell*, 4 C. B. 545. And this liability to action for refusal to serve another in one's business, undoubtedly, is confined to carriers of goods and passengers, and innkeepers, in regard to which the learned judge insists there never was any question. *Lane v. Cotton*, 12 Mod. 472, 484.

⁷ It is said there must be either a special contract or a general usage to carry the particular kind of goods, to render the party liable for not carrying. *Tunnell v. Pettijohn*, 2 Harr. 48; *Bennett v. Dutton*, 10 N. H. 481. But if the party undertake the carriage, although he had not been accustomed before to carry that kind of goods, he is liable as a common carrier, if that is his general business, unless he makes a special acceptance. See the cases cited above, and *Powell v. Mills*, 30 Miss. 231.

⁸ *Bancroft v. Peters*, 4 Mich. 619.

convenience, by temporarily unloading a part of the cargo upon the shore, and then replacing it on board after the vessel was afloat, and thus completing the voyage, is no ground for the transshipment of the whole cargo.⁹

7. In the case of goods transported by sea, it has been held competent to prove the common result of transporting goods the same voyage, whether they usually arrive in a safe or damaged condition, as a ground of presumption of negligence, or the contrary.¹⁰ But we should apprehend that, generally, it must be assumed that transportation by sea or land would not be undertaken or continued, unless in the common run the goods might be expected to reach their destination in safety. And unless protected by his own contract, the carrier would be responsible for all damage, whether with or without his fault.

8. In a recent English case, in regard to equality of charges on packed parcels, it became material to prove that the carriers had knowledge of the practice of sending packed parcels in bulk, and then distributing them upon arrival at their destination. The following question and answer were raised at the trial, and approved by the full bench: "Has this practice been notorious?" It was answered that, for the last forty years, it had been so general as to be notorious among carriers.¹¹

9. There is no doubt the owner of goods consigned by railway is bound to take notice of the course of the business, and call for them at the ordinary time of arrival,¹² and if he do not * remove them on arrival, or within a reasonable time thereafter, the company will only be responsible for ordinary neglect, and on proof of the goods being stolen, but with no evidence of want of ordinary care, the plaintiff cannot recover, and it is not error for the judge to direct a verdict for the defendant.¹³ (c)

10. But the usages of a particular port as to the manner of landing goods, it has been held, is not binding upon shippers from

⁹ *Cox v. Foscue*, 37 Ala. 505.

¹⁰ *Steele v. Townsend*, 37 Ala. 247.

¹¹ *Sutton v. Southeastern Railway Co.*, 11 Jur. n. s. 935. It was decided in this case that the court will not grant an injunction before trial to restrain an overcharge by a railway company for packed parcels.

¹² *Blumenthal v. Brainerd*, 38 Vt. 402; s. c. 2 Redf. Am. Railw. Cas. 175.

¹³ *Lamb v. Western Railroad Co.*, 7 Allen, 98.

(c) See *supra*, § 175.

another port, unless known to them, or in some way presumptively assented to.¹⁴ But it is said in *Farmers' and Mechanics' Bank v. Champlain Transportation Co.*,¹⁵ "the course of business at the place of destination, the usage or practice of the defendants and other carriers, if any, at that port and at that wharf, become essential and controlling ingredients in the contract itself." And we apprehend that every one in sending goods from one port or place to another, expects to be bound by the usages of the place of destination and the general practice of the carriers there. But where these are in contravention of the common and general usages of the business it should very clearly appear that they exist, and are of uniform observance, and not unreasonable in character,¹⁶ and that they were known, or might and ought to have been known, to the carrier.

SECTION XVIII.

Strangers bound by Course of Business and Usages of Trade.

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| <p>1. Shipper bound to know the carrier's manner of transacting business.</p> <p>2. General usages of trade presumed to be known by every one.</p> | <p>8. Contracts for transportation contain, by implication, known usages of the business.</p> |
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§ 184. 1. Questions of some difficulty often arise in regard to the effect of usage in the carrying business. If it is understood, as applicable to railways, as synonymous with the general course of transacting the business of carriers by railway companies, then those who employ them are undoubtedly bound to take notice of it.¹ (a)

¹⁴ *The Albatros v. Wayne*, 16 Ohio, 513.

¹⁵ 23 Vt. 186, 208; s. c. 2 Redf. Am. Railw. Cas. 52.

¹⁶ *Dixon v. Dunham*, 14 Ill. 324.

¹ *St. John v. Van Santvoord*, 25 Wend. 660; s. c. 6 Hill, 157. In the Supreme Court it was considered that had the shipper known that defendant was not a carrier beyond the end of his route he would have been bound only so far, but that as he did not, and the defendant gave a general receipt, describing the goods by the name of consignee and destination, the

(a) The shipper is bound, e. g., by livering to the connecting carrier, to a general custom of a carrier in deliver as consignor. Indianapolis,

* 2. The usages of any particular trade, such as are uniform or general, are presumed to be familiar to all persons having transactions in that trade or business; and all parties making contracts upon any subject leave to implication merely such incidents as are presumed to be familiar to both parties, and in regard to which there cannot ordinarily be any misunderstanding.

3. The same is eminently true of the carrying business, upon the great thoroughfares of the country. Contracts are made by way of memorandum merely; and to a jury who know nothing of * the usages and course of business in such transactions, would be quite unintelligible, and could only be made to express the real purpose of the parties in connection with such usages and course

shipper was at liberty to infer that the defendant was a carrier to that point, and therefore that the defendant was responsible for their safe delivery at their destination. The decision was reversed on error, Chancellor WATWORTH, in delivering the leading opinion, saying, that if the owner of goods neglect to make inquiry as to the usage of the business, or to give directions as to the disposal of the goods, the loss, if any, after the carrier has performed his duty according to the ordinary course, should fall on such owner.

In the case of *Gibson v. Culver*, 17 Wend. 305, COWEN, J., seems to suppose that the carrier by stage-coach is, in the first instance, bound to personal delivery, and that, in order to exonerate himself from that obligation, he must show a custom or usage of such notoriety as to justify the jury in finding that it was known to the plaintiffs. But it should be noted that this was as far as it was necessary to go in this case in order to excuse the carrier, and it is therefore not certain how far the court might have gone here if the facts had required it. For in *St. John v. Van Santvoord*, this view is altogether repudiated, and the more rational rule, that if one is ignorant of the course of business on the route he is bound to make inquiry, is adopted. See also the opinion of the court in *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 211, 212; s. c. 2 Redf. Am. Railw. Cas., 52. In *Cooper v. Berry*, 21 Ga. 526, it is said that usage may be resorted to for the purpose of showing that common carriers of certain goods are subject only to a modified responsibility in regard to their preservation, it having been the uniform practice for the carriers to except, in their bills of lading, all losses by fire, and this being known to the owners or their agents.

Bloomington, & Western Railway Co. v. Murray, 72 Ill. 128. And he may rely on a custom to deliver cars of lumber near a certain place of business. *Pittsburg, Cincinnati, & St. Louis Railway Co. v. Nash*, 43 Ind. 423. Or on a custom to deliver freight bill and expense voucher to connecting carrier, so that such carrier may assume custody of the car and carry it forward. *Reynolds v. Boston & Albany Railroad Co.*, 121 Mass. 291. As to relief to one who is deemed to have known of the usage of the carrier in delivering freight, see *Faulkner v. Hart*, 44 N. Y. Superior Ct. 471.

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of business as is presumed to be in the minds of the parties at the time of entering into the contract. And if one of the parties assumes to transact any business, in ignorance of the very elementary usages of such business, he is not allowed to gain an unjust advantage of the other party through his own voluntary or rash ignorance, nor is the other party at liberty to take advantage of such ignorance and inexperience (when made known to him) to induce such inexperienced one to assume an unequal risk on his part. But where the usage or custom is resorted to for the purpose of controlling the general principles and obligations of the law of contract, there is no doubt of the necessity of showing its notoriety, as well as its reasonableness and justice. The latter qualities are generally supposed to be sufficiently shown by the general acquiescence of the public in the usage. But where the complaint against the carrier was for not delivering cotton in good condition, a plea that it was the custom known to the plaintiff to transport cotton and other freight between the points named in the bill of lading, in open boats, and that all the damage which the cotton sustained was caused by the rains which fell during the voyage, was held good on demurrer.²

² *Chevallier v. Patton*, 10 Tex. 344. Where cotton is shipped through an agent for that purpose, he is authorized to bind his principal according to law. In the absence of proof to the contrary, the general law of common carriers is the power under which the agent acts. If a usage be sufficiently established, that will govern, because it is presumed to be known to the parties. And this presumption is conclusive on the principal, whether it is known to the agent or not. But a custom known only to the agent, and which is not so established as to change the law of the contract, will not bind the principal.

By way of establishing a usage in shipping on a particular river, it is competent for a witness to testify as to what has been his habit and custom in shipping on all the boats on the river, as well as on the particular boat on which the loss occurred. To make a usage good, it must be known, certain, uniform, reasonable, and not contrary to law. Thus if certain boats gave sometimes bills of lading containing an exemption from loss by fire, and at other times bills containing no such exemption, then no such usage is established. And even if, in a majority of cases, bills of lading contain such clauses of exemption, still the usage is not sufficiently proved to make it the law of the contract between the parties. *Berry v. Cooper*, 28 Ga. 543. The usage of a port that a written receipt from the consignee or his agent is requisite to constitute a complete delivery by carriers at such port, is a bad usage and not binding on the owner of the goods, or available in defence of an action against the consignee for loss of the goods through his negligence. *Reed v. Richardson*, 98 Mass. 216.

*SECTION XIX.

Cases where the Carrier is not Liable for Gross Negligence.

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| <ol style="list-style-type: none"> 1. Under English Carriers' Act carrier not liable for articles of great value in small compass, &c. 2. Unless the shipper makes specification, and pays a higher rate. 3. Or unless the loss occurs through felony of servants, which may charge carrier with negligence. 4. And not even then, if the consignor uses disguise in packing. | <ol style="list-style-type: none"> 5. Carrier is entitled to have an explicit declaration of contents. 6. But refusal to declare contents will not excuse the carrier from carrying. 7. Exemption of statute applies only to loss. It does not excuse carrier for delay in delivery. 8. Disposition of English courts to hold carriers to more strict accountability. |
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§ 185. 1. Under the English Carriers' Act,¹ the carrier is not liable for the carriage of articles there enumerated as "articles of great value in small compass," with certain specified ones, as "money, bills, notes, jewellery," &c., if the requisitions of the statute are not complied with, although the goods be lost through the gross negligence of the carrier or his servants.² It was said * in one case where the construction of this act came in question,³ that it is impossible, with precise accuracy, to define what are "trinkets" within the meaning of the act. But as the closest approximation to this, it was said that they must be articles of mere ornament, or if ornament and utility be combined, the former must be the predominant quality. And as instances, it was

¹ Statute 1 Wm. IV. & 11 Geo. IV., c. 68. Looking-glasses being specified in the act, it was held to extend to a "large looking-glass." *Owens v. Burnett*, 2 Car. & M. 357. Some other curious inquiries have arisen under this act, in regard to its extent. Thus the word "trinkets," used in the act, was held not to comprehend an eye-glass with a gold chain attached. *Davey v. Mason*, 1 Car. & M. 45. And also that "silks" does not include silk dresses, made up for wearing. *Ib.* Hat bodies, made partly of wool and partly of fur, are not "furs." *Mayhew v. Nelson*, 6 Car. & P. 58. So, too, a bill of exchange, accepted blank, and sent to the party for whose benefit it was accepted, and who was expected to sign it, as drawer, and which was lost before it reached its destination, is not a bill or note, within the act.

² *Hinton v. Dibbin*, 2 Q. B. 646, where the act was upon this point first construed; opinion by Lord Chief Justice DENMAN.

³ *Bernstein v. Baxendale*, 6 C. B. N. s. 251. See also *Baxendale v. Great Eastern Railway Co.*, Law Rep. 4 Q. B. 244, where many questions under the English Carriers' Act are extensively discussed in the Exchequer Chamber.

said bracelets, shirt-pins, rings, brooches, and ornamented shell and tortoise-shell portmonnaies, however small their intrinsic value,* are trinkets. So silk watch-guards were held to be silk in a manufactured state; and smelling-bottles and the like are glass within the act.

2. The act contains an exception of loss caused by the felony of the carrier's servants. The condition upon which, in all cases, the carrier is to be made liable for carrying the articles enumerated, is, that at the time of the delivery of the articles the owner, or his agent, make a declaration of the nature and value of the goods, and pay or agree to pay, any increased rate of charge which the general regulations of the carrier may require.

3. In regard to the liability of the carrier for loss by the felony of his servants, it was held, that when the carrier was not notified of the contents of the parcels, as, by the act, he was entitled to be, it was only the liability of an ordinary bailee for hire.⁴ And the mere fact of loss by the felony of a servant, is not *prima facie* evidence of negligence in a bailee for hire.⁵

4. And where the owner uses artifice to disguise the valuable contents of the parcel, as where two hundred sovereigns were enclosed in six pounds of tea, and they were stolen by the carrier's servants, it was held the carrier was not liable, the owner having virtually contributed to his own loss.⁶

5. Under this act the carrier is entitled to have an express declaration from the owner, or his agent, of the contents of a box, or package, whenever it is delivered, however obvious to conjecture the nature of the contents may be.⁷

⁴ *Butt v. Great Western Railway Co.*, 11 C. B. 140; s. c. 7 Eng. L. & Eq. 443. In case of *Great Western Railway Co. v. Rimel*, 6 C. B. N. s. 917, it is said a carrier is not liable for the felonious act of his servants without gross negligence, but felony in his servants is alone a good answer to a defence by him under the Carriers' Act.

⁵ *Finucane v. Small*, 1 Esp. 315. "To support an action of this nature, positive negligence must be proved," *per* Lord KENYON. There should be proof of the loss being by the felony of the company's servants, and that it was not committed by others. *Metcalf v. London, Brighton, & South Coast Railway Co.*, 4 C. B. N. s. 307.

⁶ *Bradley v. Waterhouse, Moody & M.* 154; s. c. 8 Car. & P. 818. See also *Southern Express Co. v. Everett*, 37 Ga. 688.

⁷ *Boys v. Pink*, 8 Car. & P. 361. And in *Baxendale v. Hart*, 6 Exch. 769; s. c. 9 Eng. L. & Eq. 505, in error, reversing the judgment below.

* 6. But it seems that the refusal to declare the contents of a parcel will not justify the carrier in refusing to carry it, but only excuses the loss.⁸

7. In a late case⁹ it was held, that the exemption of the carrier under this act had reference exclusively to a "loss" of the article "by the carrier," such as by the abstraction by a stranger or by his own servants, not amounting to a felonious act, or by the carrier or his servants losing them from vehicles in the course of carriage or by mislaying them, so that it was not known where to find them when they ought to be delivered, and that it does not extend to any loss of any description whatever, occasioned to the owner of the article, by the non-delivery or by the delay of the delivery of it, by the neglect of the carrier or his servants.¹⁰

* 8. The last case cited is certainly not a little of a manifestation of a disposition in the English courts to restore, as far as practicable, * the reasonable responsibility of carriers, which under the former decisions, with reference to notices and special contracts, had become uncertain and somewhat problematical.¹⁰

⁸ *Pianciani v. London & Southwestern Railway Co.*, 18 C. B. 226 ; s. c. 36 Eng. L. & Eq. 418 ; *Crouch v. London & Northwestern Railway Co.*, 14 C. B. 255 ; s. c. 25 Eng. L. & Eq. 287.

⁹ *Hearn v. London & Southwestern Railway Co.*, 10 Exch. 793 ; s. c. 29 Eng. L. & Eq. 494.

¹⁰ *Supra*, §§ 177, 178, 179, and cases cited. The present English statute in regard to freight generally refers the terms of special contracts to the court, as to their reasonableness. In *Simons v. Great Western Railway Co.*, 18 C. B. 805 ; s. c. 37 Eng. L. & Eq. 286, it was held that the Railway and Traffic Act, 1854, 17 & 18 Vict. c. 81, § 7, does not prevent a railway company from making a special contract as to the terms on which it will carry goods, provided such contract be "just and reasonable," and signed by the party sending the goods ; that it is for the court to say, on the whole matter, whether or not the "condition" or "special contract" is just and reasonable ; that a condition, that the company will not be accountable for the loss, detention, or damage of any package insufficiently or improperly packed, is unjust and unreasonable ; and *semble*, that a condition "that no claim for damage will be allowed, unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time that they should be delivered," is just and reasonable ; and that a condition, that in the case of goods conveyed at special or mileage rate, the company will not be responsible for any loss or damage, however caused, is just and reasonable.

In *London & Northwestern Railway Co. v. Dunham*, 18 C. B. 826, which was a case sent by a county court judge for the opinion of the Court of Common Pleas, it was stated that the goods, three crates of beef, were received by the

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defendant, under a note signed by the plaintiff, stating that "hay straw, furniture, glass, marble, china, castings, and other brittle and hazardous articles," &c., were conveyed at the risk of the owners, it was held that the court could not, from this statement, judge whether or not the condition was "just and reasonable" within the statute.

The law of that country is, therefore, by this statute, now brought back nearly to its original starting-point. Mere general notices in regard to the liability of carriers are of no avail, unless reduced to the form of special stipulations in regard to the liability of the carrier, and signed by the party sending the goods, nor then even unless, in the opinion of the court before whom the case shall be tried, they are "just and reasonable." This act, it is specially provided, shall not affect the Carriers' Act, or any liability under it. But in a case in the Common Bench it was held, that where the carrier in the bill of lading expressly excepted losses from "leakage and breakage," this exception did not extend to such losses as occurred from his own negligence, but only such as occurred without his fault. *Phillips v. Clark*, 2 C. B. N. s. 156.

And where the railway company received cattle for carriage on the express terms, in writing, signed by the owner, that they were to be held free from all risk and responsibility in respect of any loss or damage to cattle, arising in the loading or unloading, from suffocation, or from being trampled on, bruised, or otherwise injured in transit, from fire, or any other cause whatsoever, it was held to be a reasonable condition within the Railway and Canal Traffic Act, 1854. And it was said that this protected the company from liability for the loss of cattle by suffocation during the journey, occasioned by the negligence of the company's servants. But it was further said, that the facts did not tend to show negligence in the company's servants, the plaintiffs being permitted to send, free of expense, a person who had the oversight of the cattle, and who made no complaint of the sufficiency and safety of the arrangements for transportation. *ALDERSON, B.*, said, "I think the negligence was really that of the servants of the plaintiff, and that the defendants are not liable on that ground." *Pardington v. South Wales Railway Co.*, 1 H. & N. 392; s. c. 38 Eng. L. & Eq. 432. In *Betts v. Farmers' Loan & Trust Co.*, 21 Wis. 80, it was held that common carriers may contract with the owner of live stock that he shall assume all risk of damage, from whatever cause, in the course of transportation.

In *Kendall v. London & Southwestern Railway Co.*, 20 W. R. 886, where it appeared that the plaintiff's horse, carried by railway, was peaceable and quiet and accustomed to that mode of conveyance, but was seriously injured on the passage, and there was evidence that no neglect occurred on the part of the company, it was held, that the company was not responsible, the legal presumption being that the damage must have occurred from some misconduct of the animal.

*SECTION XX.

*Goods of Dangerous Quality. — Internal Decay. — Bad Package.
— Stoppage in Transitu. — Claim by Superior Right.*

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| <ol style="list-style-type: none"> 1. Loss the result of natural causes, bad packing, &c. 2. Dangerous commodities must be so reported to the carrier. 3. Carrier not responsible for natural decay or leakage occurring without his fault. 4. Owner must bear loss from dampness of the hold, as one of the accidents of navigation. 5. Owner must bear loss from bad condition of article when shipped. 6. Carrier responsible only for damages caused by delay, where the owner selects carriage and loads it. 7. Carrier must do all in his power to arrest incipient losses. 8. Right to stop <i>in transitu</i> as affecting carriers. Notice to carrier. 9. Carrier liable, if he do not surrender | <ol style="list-style-type: none"> the goods, to one having right to stop <i>in transitu</i>. 10. Carrier may detain until right is determined. 11. Right exists as long as the goods are under control of carrier. 12. Most uncertainty exists where there are intermediate consignees. 13. Right exists while goods are in the hands of mere carriers, but not when they reach the hands of the consignee's agent for another purpose. 14. Carrier bound to solve question of claimant's right, at his peril. 15. Conflicting claims may be determined by replevin, or interpleader. 16. Or the carrier may deliver the goods to rightful claimant, and defend against bailor. 17. Inchoate delivery for special purpose. |
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§ 186. 1. In addition to the general exceptions which the law makes to the liability of carriers, of losses from inevitable accident and the public enemy, there are some others more or less connected with those which it may be proper to mention. Losses from natural causes, such as frost,¹ fermentation,² evaporation,² or * natural decay of perishable articles,² the carrier exercising

¹ *Supra*, § 167, and note 9.

² Bull. N. P. 69; 3 Kent Com. 299, 300, 301; Story Bailm. § 492 a; Warden v. Greer, 6 Watts, 424; Powell v. Mills, 37 Miss. 691.

Where molasses in a large cask loses by leakage, through the pressure of the weight of the cask on the bilge of the staves, the road being rough by reason of frost, and the cask not placed on supports so as to divide the pressure more equally, it is held, the cask being strong enough for ordinary transportation, that the carrier is liable for the loss. *Stocker v. Sullivan Railroad Co.*; *Angell Car.* §§ 210, 211, 212. See *Walf. Railw.* 315, 316, for a citation of a number of cases illustrating this subject.

The company is not liable for an accident arising from the viciousness or bad temper of an animal sent by the railway. *Walker v. London & South-*

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all reasonable care to preserve them,² (a) and from the natural and * necessary wear by careful transportation,² in the mode to

western Railway Co. Or from the natural propensity of the animals. *Clarke v. Rochester & Syracuse Railroad Co.*, 14 N. Y. 570. The carrier of cattle is not responsible for injuries resulting from their viciousness of disposition and the question, what was the cause of the injury, is one of fact for the jury. *Hall v. Renfro*, 3 Met. Ky. 51. The same rule was adopted in *Great Western Railway Co. v. Blossom*, 20 W. R. 776. But in such cases the carrier is liable for any injury which might be prevented by the utmost foresight, vigilance, and care. *Ib.*; *Conger v. Hudson River Railroad Co.*, 6 Duer, 375. So from injuries to merchandise from bad package. *Norman v. London & Brighton Railway Co.* So for leakage by reason of bad package. *Lucas v. Birmingham & Gloucester Railway Co.* So also where goods are unreasonably exposed to fire for want of proper covering. *Rutley v. Southeastern Railway Co.* (1845). And where the owner put several packages, one of flutes, one of watches, &c., into the same bag and sent them by railway, and the flutes were injured, it was left to the jury to say whether the accident was attributable to the carelessness of the company, or whether the plaintiff, by his own improper proceeding, contributed to the disaster, the mode of packing having thrown upon the company a more onerous task than if it had received the articles separately. *Smith v. London & Birmingham Railway Co.*

But the consignee of goods well packed is not obliged to accept a remnant of them in a loose, unpacked state. *Chicago & Rock Island Railway Co. v. Warren*, 16 Ill. 502. And in a recent trial before Mr. Justice WOODWARD, of the Pennsylvania Supreme Court, *Ritz v. Pennsylvania Railroad Co.*, 3 Phila. 82, where the defendant claimed to excuse itself from liability for injury to sheep, for that too many were put into each car by the consignor, who was left to exercise his own judgment as to the number, the learned judge told

(a) *Vail v. Pacific Railroad Co.*, 63 Mo. 230. The carrier must forward them without delay. If there is unreasonable delay, the carrier will be liable. *McGraw v. Baltimore & Ohio Railroad Co.*, 18 W. Va. 361; *Michigan Central Railroad Co. v. Curtis*, 80 Ill. 324; *Tierney v. New York Central & Hudson River Railroad Co.*, 67 Barb. 538; s. c. 76 N. Y. 805; *Michigan Central Railroad Co. v. Curtis*, 80 Ill. 324. The ordinary accidents of railway traffic will not excuse him. *Chicago & Alton Railroad Co. v. Thrapp*, 5 Brad. 502. As to what will excuse delay, see *Monell v. Northern Central Railroad Co.*, 67 Barb. 531. Where goods are such as may be injured by freezing, delay will not render the carrier liable, where the freezing occurs while the goods are in possession of a subsequent carrier, guilty of negligent delay. *Michigan Central Railroad Co. v. Burrows*, 33 Mich. 6. Where the goods are perishable, and the carrier is prevented by unavoidable accident from getting them to destination before they will be spoiled, he may sell them for the best price obtainable. *American Express Co. v. Smith*, 33 Ohio St. 511. See *Indianapolis & St. Louis Railroad Co.*, 81 Ill. 143.

which the carrier is accustomed; or from the defective nature of the vessels or packages in which the things are put by the owner or consignor, the former class being regarded as the act of God, and the latter the fault of the party, will not form any ground of action against the carrier. Where the bill of lading contained in the margin the words "not accountable for leakage or breakage," the goods being casks of wine, it was held not to exempt the carrier from the ordinary condition of due care in the stowage of the casks. The different degrees of negligence are here thus defined: "Gross negligence is used to describe the sort of negligence for which a gratuitous bailee is * liable; but it is not properly applicable to an unskilled person who does not use skill, but only where a skilful person does not use the skill he has." The subject of the proper distinction between the different degrees of negligence is here discussed, and the cases commented upon at much length.³

the jury that the company could not so shift the responsibility which the law imposed on it; that the company best knew how many could safely be put into a car, and was bound to superintend the loading. This rule ought to be approved.

The same principle is affirmed in *Powell v. Pennsylvania Railroad Co.*, 7 Law Reg. 348; s. c. 32 Penn. St. 414, by the same learned judge. It was there held that where the agents, or servants of a common carrier, having charge of that portion of the business, suffer the shipper of live stock to put straw into a car, although under protest that if he do so it must be at his own risk, and the straw is fired and damage done to the animals, being horses in this instance, this constitutes negligence in the carrier, and he is liable to respond in damages, although the shipper signed a release from all claim to damages to such stock while in the company's cars.

But where the owners of freight hire cars, load them as they choose, and are told that they load at their own risk, it has been held that the company is not responsible for damages occasioned by injudicious loading, or for any loss resulting from the inherent defects of the article causing its destruction, or for decrease in the weight of live stock, arising from the mode of transportation, but is liable if any loss is caused or increased by its own want of care and watchfulness. *Ohio & Mississippi Railroad Co. v. Dunbar*, 20 Ill. 623. But see *Pratt v. Ogdensburg & Lake Champlain Railroad Co.*, 102 Mass. 557.

And a carrier is not responsible for leakage arising from an imperfection in the bung of a cask intrusted to him to be carried, and not caused or increased by any negligence on his part. *Hudson v. Baxendale*, 2 H. & N. 575. It is not conclusive evidence of negligence on the part of the carrier to pack bales of cotton into cars so tightly, that, in case of fire, they could not be speedily removed. *Pemberton Co. v. New York Central Railroad Co.*, 104 Mass. 144.

* *Phillips v. Clark*, 5 C. B. N. S. 882. See also *Briggs v. Taylor*, 28 Vt.

2. Questions of some difficulty often arise in regard to the dangerous quality of the articles delivered to carriers for transportation, and the consequent duty of the owner of the goods. It would seem to be reasonable in such cases, and such seems to be the course of the decisions, that the owner shall inform the carrier of the character of the goods, whenever that is essential to be known, either on account of carrying the particular goods safely, or of carrying them in such a manner that other goods may not be damaged by coming in contact with them, and that for any default in this particular the owner is responsible, not only to the extent of any damage accruing to the goods, but even beyond that.⁴

3. And the carrier is not responsible for the decay of perishable articles, without his fault, even where he is driven by stress of weather, out of the direct course, into a strange port for repairs, whereby the injury is caused, or increased.⁵ Nor is he responsible for leakage through the nature of the article or the defect of the casks, without fault on his part. The owner of articles subject to such contingencies, in hot weather and warm climates, as lard, for instance, assumes all such risks as necessarily, or ordinarily, attend similar shipments, where they occur without the fault of the carrier.⁶

* 4. And damage done to cotton thread by reason of the dampness of the hold, not occasioned by any fault of the carrier, is an accident of navigation within that exception in the bill of lading, and the shipper must bear the loss resulting from such accidents,

180; s. c. 2 Redf. Am. Railw. Cas. 558. And where one delivers goods of a dangerous character, such as oil of vitriol, to a carrier, without disclosing its dangerous quality, he is not liable to a statutory penalty, unless himself aware of the contents; but he may nevertheless be responsible to the company, in a civil action for all damage, since one who delivers such a parcel must be presumed to be aware of its contents so far as civil responsibility for consequences is concerned. *Harne v. Garton*, 5 Jur. n. s. 648; s. c. 2 Ellis & B. 66. So also where the owner allowed a servant of the carrier to take a carboy of oil of vitriol from his cart without making him understand the dangerous qualities of the article, only saying it contained acid, and the servant was seriously injured by the bursting of the carboy while carrying it on his back, he was held liable to the servant in an action for the damages sustained. *Farrant v. Barnes*, 11 C. B. n. s. 553; 8 Jur. n. s. 868.

⁴ *Hutchinson v. Guion*, 5 C. B. n. s. 149; *supra*, note 3.

⁵ *The Collenberg*, 1 Black, 170.

⁶ *Nelson v. Woodruff*, 1 Black, 156.

unless he can show that the negligence of the master or mariners made it operative on his goods.⁷ As the taking of salt as part of the cargo of a general ship is common and allowable, the owners of other goods liable to be injured thereby, must bear the resulting loss, if there was no bad stowage and no injury made by the shipper in regard to it.⁷ The declaration in the bill of lading, that the goods are "shipped in good order, contents unknown," is only *prima facie* evidence of the goods being in such condition at the time, as it must of necessity have reference only to the external appearance of the packages. And where proof is given tending to show such was not the fact, it casts the burden upon the owner to prove the actual condition of the goods when shipped.⁷

5. The shipper is responsible for all losses resulting from the articles being in bad condition when shipped, and perishing during the voyage without the fault of the carrier.⁸ This was the case of a cargo of potatoes. The question of the responsibility of carriers by water is very carefully and learnedly examined by Mr. Justice CLIFFORD, in *The Niagara v. Cordes*,⁹ and the duty of the master to do all in his power to protect the goods on board, after the stranding of his vessel, very clearly stated.

6. It is the general duty of carriers to furnish safe and suitable carriages for the transportation, and to see that the articles are properly stowed therein.¹⁰ But where the owner makes his own selection of the carriage, knowing of the defects therein, and the carrier is bound to see that he does know thereof;¹¹ or where the shipper selects his own carriages and charters and loads them himself,¹² the carrier is not, it has been said, responsible for injuries resulting from defects in the carriages or loading. But in the former case, he is responsible for increased damage resulting from delay on the passage, beyond the ordinary time, and from not having the cattle on * board properly watered. And the

⁷ *Clark v. Barnwell*, 12 How. 272.

⁸ *The Howard v. Wissman*, 18 How. 231.

⁹ 21 How. 7.

¹⁰ *Hannibal Railroad Co. v. Swift*, 12 Wal. 262.

¹¹ *Harris v. Northern Indiana Railroad Co.*, 20 N. Y. 232. And it will not excuse the carrier from his responsibility, as a common carrier, that the owner furnishes and loads and unloads his own cars, and also furnishes the brakeman. *Mallory v. Tioga Railroad Co.*, 39 Barb. 488.

¹² *East Tennessee & Georgia Railroad Co. v. Whittle*, 27 Ga. 535.

owner of the cattle, in order to preserve his right of action against the carrier, is not bound to insist upon the cars proceeding, when ordered to wait for another train, or to insist upon attempting to water the cattle when told that the train might start before that could be done. He is justified in conforming to the directions of the conductor, and it is the duty of the latter to see that cattle on board are properly cared for.

7. It is the duty of a carrier to make all reasonable exertions to save an incipient damage to goods becoming more serious than is absolutely necessary, although he may not have been in fault on account of, or responsible for, its occurrence.¹³ It is no excuse for the carrier, that, where the goods were injured by rain, in their passage to the defendant's wagon and office, they were not secured in cases or water-proof coverings.¹⁴

8. In regard to stoppage *in transitu*, it is a subject which in its general bearing does not properly come within the range of this work, but as it incidentally affects the rights of common carriers, in all modes, it may be useful to give here its general definition, and briefly point out the mode in which carriers are liable to be affected by the exercise of the right. Stoppage *in transitu* is the right which resides in the vendor of goods upon credit, to recall them upon discovering the insolvency of the vendee, before the goods have reached him, or any third party has acquired *bona fide* rights in them.¹⁵ (b) The carrier's interest in this question arises

¹³ *Chouteau v. Leech*, 18 Penn. St. 224; *Blooker v. Whittenberg*, 12 La. An. 410.

¹⁴ *Klauber v. American Express Co.*, 21 Wis. 21.

¹⁵ 2 Kent Com. 540, *et seq.*; *Lickbarrow v. Mason*, 1 H. Bl. 357; s. c. 6 East, 21; s. c. 2 T. R. 63; 1 Smith Lead. Cas. 388 and notes, where all the law of the subject, both English and American, may be found. The right to stop goods *in transitu* is nothing more than the extension of the vendor's lien for the price, until after delivery, to the very point of the goods coming to the actual custody of the vendee, or his agent. *SHAW, C. J.*, in *Rowley v. Bigelow*, 12 Pick. 313. This leading case establishes the point, that the vendee may defeat the right of the vendor to stop the goods *in transitu* by a *bona fide* assignment of the bill of lading for value. And we are not aware that the right can be defeated in any other mode, until the goods come to the virtual possession of the vendee. If the vendor knew of the insolvency

(b) The agent of the seller has no advanced to purchase the goods. right to stop the goods merely because *Gwyn v. Richmond & Danville Rail-* his principal owes him for money road Co., 85 N. C. 429. As to who

only when he is required by the vendor, while the goods are still in his possession, to redeliver them to him or some one on his account.

* 9. After such demand it becomes important to the carrier to determine whether the right to reclaim the goods still exists. For if so, and the carrier decline to redeliver them or deliver them to the vendee, he and all persons claiming to retain them against the claim of the vendor, become liable in trover for their value.¹⁶

10. The principal difficulty which arises in such cases, so far as the carrier is concerned, will be likely to occur in regard to goods which have passed through other hands, before coming to those of the carrier on whom the demand for the goods is made. For in the case of a single carrier, he may safely conclude that if such a demand is made upon him while the goods are in his custody,

of the vendee at the time of the sale he has no right of stoppage *in transitu*; but if the fact come to his knowledge after the sale, although existing before, the right exists the same as if the insolvency had occurred after the sale. *Blum v. Marks*, 21 La. An. 268.

¹⁶ *Litt v. Cowley*, 7 Taunt. 169; *Bohtlingk v. Inglis*, 3 East, 381; *Syeds v. Hay*, 4 T. R. 260; *Bierce v. Red-Bluff Hotel Co.*, 31 Cal. 160; *Jones v. Earl*, 37 Cal. 630. And distinct notice to the carrier that the vendor exercises his right of stoppage *in transitu*, and will hold the carrier responsible for the goods, will make him bailee for the vendor, and this notice given to such agent of the carrier as then has the custody of the goods in the due course of his employment, will be sufficient. *Ib.*

is the vendor, and so vested with this right, see *Memphis & Little Rock Railroad Co. v. Freed*, 38 Ark. 614. Assignment of the bill of lading to an innocent purchaser will defeat the right. *Newhall v. Central Pacific Railroad Co.*, 51 Cal. 345. But not where the transferor has obtained it by fraud. *Evansville & Terre Haute Railroad Co. v. Erwin*, 84 Ind. 457. The notice to the carrier of a desire to exercise the right of stoppage *in transitu* is sufficient if it clearly inform the carrier of such desire. *Bloomington v. Memphis & Charleston Railroad Co.*, 6 Lea Tenn. 616. But it must be so specific as to enable the carrier to

identify the goods. *Clementson v. Grand Trunk Railway Co.*, 42 U. C. Q. B. 263. Notice to the station agent is notice to the company. *Poole v. Houston & Texas Central Railway Co.*, 58 Tex. 134. The objection that the purchaser is not insolvent cannot be raised by the carrier. He may, however, show that the debt might have been collected by due diligence. *Bloomington v. Memphis & Charleston Railroad Co.*, 6 Lea Tenn. 616. The consignor cannot by notice to the carrier compel him to stop the goods at an intermediate point. *Pinnix v. Charleston & South Carolina Railroad Co.*, 66 N. C. 84.

it will be prudent to retain them until the existence of the asserted right is established, and if so, to surrender them in obedience to the demand, as there can be no question of the right of the unpaid vendor ordinarily to reclaim the goods, in case of the insolvency of the vendee, as long as they remain in the possession of the carrier.¹⁷

11. It is not enough, to defeat this right, that the transportation is accomplished, if the goods still remain under the care and control of the carrier, as, in the case of a railway, in the warehouse of the company, awaiting the arrival of the vendee, or in the warehouse of a wharfinger, or warehouseman; ¹⁸ (c) unless, as is

¹⁷ See cases cited in note 15. And it would not be regarded as a conversion in the carrier, after a demand from the vendor, to retain the goods long enough to enable him to ascertain whether the right to stop *in transitu* ever existed, and if so, whether any intervening rights had accrued by the act either of the vendor or of the vendee, which would defeat it.

¹⁸ *Dodson v. Wentworth*, 4 Man. & G. 1080, where TINDAL, C. J., thus states the distinction between the cases where deposit in the warehouse of the carrier or other person ends the transitus, and those where it does not, saying that where the warehouse is that of a third person, the question is whether the depositary acts "as the agent of the carrier, or the consignee."

In *Harris v. Hart*, 6 Duer, 606, this subject is discussed with great ability by a court of large experience in commercial law, and an attempt is made to rescue the principle on which all the cases profess to go from something of that confusion into which some of the modern, and especially the American cases, have thrown it. The principle on which the whole subject rests, is, that of giving the vendor a lien for the price of the goods, until they come into the actual possession of the vendee, or of his agent, for custody, and not for transportation. With this view all reasonable construction should be in favor of maintaining the lien. Hence in this last case it was justly held, that while the goods were in the course of transportation, even by the vendee's

(c) *Calahan v. Babcock*, 21 Ohio St. 281; *Mohr v. Boston & Albany Railroad Co.*, 106 Mass. 67. In the absence of understanding to the contrary, the employment of a carrier by a seller of goods on credit constitutes all subsequent carriers agents of the vendor for transportation and delivery, and until the complete performance of that duty, the goods are deemed to be *in transitu*. *Calahan v. Babcock*, 21 Ohio St. 281. But see *Louisville &*

Nashville Railroad Co. v. Spalding, 22 Am. & Eng. Railw. Cas. 418. The right still exists, though the goods have reached their destination and have been set aside in the warehouse of the carrier, under an agreement with the consignee that they be sold and the charges for transportation paid out of the proceeds, the residue if any to be paid to the consignee. *Macon & Western Railroad Co. v. Meador*, 65 Ga. 705.

said * in some of the cases, the vendee, by special contract and understanding, is accustomed to use the warehouse of the carrier or * wharfinger as his own. In such case it is the same, when the goods are deposited in the warehouse of the carrier or warehouseman * or wharfinger, as if they had reached the warehouse of the vendee himself.¹⁹

agent on board his own or a hired vehicle, the right to stop *in transitu* still existed.

And in the case of *Sheridan v. New Quay Company*, 4 C. B. N. s. 618; s. c. 5 Jur. N. s. 248; where goods were sold to a party at Manchester to be forwarded to Liverpool for delivery, and were accordingly sent to L. and put into the hands of defendants, who were wharfingers and carriers at L., to be carried to Manchester for the buyer, it was held that the seller's right of stoppage *in transitu* was not gone.

And in *Schotsman v. Lancashire & Yorkshire Railway Co.*, Law Rep. 1 Eq. 349; s. c. 12 Jur. N. s. 42, this precise point is very carefully considered by Lord ROMILLY, M. R., and it is held that right of stoppage *in transitu* is not lost because the vessel on which the goods are shipped is the property of the vendee, if the vessel is a general ship, and is employed as a mere common carrier; and that it would seem to be otherwise if the vessel were sent by the vendee expressly to fetch these particular goods, or if any agent were on board expressly authorized to receive them; or if the bills of lading were delivered to the captain, or sent to the vendee.

There seems to be no question of the right of the unpaid seller to stop the goods in the course of the transit, even after they come into the hands or control of a particular person named by the buyer as his agent for the purpose of receiving and forwarding the goods. *Carfan v. Campbell*, 6 Am. Law Reg. 561, citing *Covell v. Hitchcock*, 23 Wend. 611. But where the bill of lading is *bona fide* obtained from those having the general authority to negotiate it, and value paid in faith of it, the right to stop *in transitu* is gone, although the party negotiating it be guilty of fraud as to another party to whom it had been contracted and value paid. *Pease v. Gloahec*, Law Rep. 1 P. C. 219; s. c. 12 Jur. N. s. 677.

¹⁹ *Rowe v. Pickford*, 8 Taunt. 83. This is the case of a trader in London who was in the habit of purchasing goods in Manchester and exporting them to the Continent soon after their arrival in London, the goods in the mean time remaining in the wagon-office of the carriers. It was held that the right of stoppage *in transitu* ceased on the arrival of the goods at the wagon-office. See also *James v. Griffin*, 1 M. & W. 20; *Edwards v. Brewer*, 2 M. & W. 375. It is never deemed important, in order to defeat the right to stop *in transitu*, that the goods should have come to the very hands of the consignees. It is enough if they have come to the hands of some one acting for them. *Ellis v. Hunt*, 3 T. R. 464. If the consignee generally makes use of the wharfinger's warehouse as a place to keep his goods in, the transitus is at an end when the goods are deposited there. *Tucker v. Humphrey*, 4 Bing. 516;

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* 12. But by far the most difficult questions arise under this head in a class of cases, quite numerous, where the goods are * directed by a particular route, through successive lines of carriers, and at the intermediate points to the care of particular persons * who may be wharfingers, forwarding merchants, warehousemen, carriers, or combining two or more of these capacities. But * where one had employed an agent at an intermediate stage in the transit to forward all goods coming to that port for him, it was held not to terminate the transitus when the goods reached the hands of such agent and were by him forwarded by another ship.²⁰ A usage for carriers to detain goods on a lien for the general balance of account between them and the consignees, will not affect the right to stop *in transitu*.²¹

13. The principle by which the question of the continuance of the transitus is determined in this class of cases, is the same already stated. If the person to whose custody the goods are con-

Richardson v. Goss, 3 B. & P. 119; Foster v. Frampton, 9 D. & R. 108; s. c. 6 B. & C. 107.

Wentworth v. Outhwaite, 10 M. & W. 486. Here the goods were kept by the carrier as warehouseman at the end of the public carrier's route until they could be sent for by the vendee at his own convenience, and on payment of warehousing. It was held that the transitus terminated on the arrival of the goods at the warehouse. This case is put by ABINGER, C. B., with whom the court concur, on the ground that the warehouseman was an agent of the buyer for receiving the goods and keeping them, *not for forwarding*, which showed the transitus at an end. Baron PARKE also said that "the carriers held them, not as agents for forwarding them, but for their safe custody, and they were constructively in the possession of the vendee." Dodson v. Wentworth, 4 Man. & G. 1080, is a similar case, and decided on the same ground. Dixon v. Baldwin, 5 East, 175. In Heinekey v. Earle, 8 Ellis & B. 410, goods were shipped by order to A., and the bill of lading made them deliverable to A. on payment of freight; but on their arrival, A., being embarrassed, and not wishing to accept the goods if he stopped business, objected to receive them. They were afterwards landed, however, and locked up in his warehouse, A. intending to warehouse them for the seller if he could do so. The seller demanded the goods, and A. declined to surrender them, on the ground that his solicitor advised him that he could not do so safely. The goods were subsequently assigned for the benefit of creditors. It was held that the transit was at an end.

²⁰ Nicholls v. Le Feuvre, 2 Bing. N. C. 81; s. c. 2 Scott, 146. And that the intermediate agent has paid the charges for former transportations will make no difference. *Ib.*

²¹ Openheim v. Russell, 3 B. & P. 42.

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signed, at an intermediate point, is only to be regarded as an agent for forwarding, or keeping, or carrying, in the course of the transportation, then the transitus is not ended. But upon the other hand, if such person, although a carrier, or connected with the carrying business, is to keep the goods for the consignee, and, as his agent, or in that capacity, to give them a new destination, or so to keep them until the consignee can send for them, or dispose of them, or give them a new destination, in all these cases the transitus is ended.²²

14. Railway companies, from the manner of transacting their business, would not be likely to be exposed to the raising of such questions very often, while the goods were in their custody. But as many of the long lines of transportation consist of numerous independent routes, and often in different countries, states, or kingdoms, such questions very frequently arise upon prior portions of the line, which they are by the rules of law compellable to solve, at their peril, upon an admonition by telegraph from an unknown * party, a thousand miles distant, which renders it of consequence that they should be able to obtain competent counsel upon questions of this character.²³ It is the same in regard to all goods put into the custody of the carrier by a subordinate party, if demanded by the party having superior right, the carrier must surrender them to him, or he is liable in trover if the goods still remain in his possession, otherwise if he have finished his office in regard to them.²⁴ It seems to be settled, that the right to stop goods *in transitu* is divested by the *bona fide* purchase of the assignment of the bill of lading, without notice of fraud in any intermediate assignee, although, as between some of the former

²² Cases cited in note 8. See also *Covell v. Hitchcock*, 23 Wend. 611; s. c. 2 Redf. Am. Railw. Cas. 380. And where it is the practice of a carrier at a particular place to deposit goods on a public wharf, and for the consignees to come and take them away at their pleasure, no one having any further charge of them, it was held that the transitus ended on the goods reaching the wharf. *Sawyer v. Joslyn*, 20 Vt. 172; s. c. 2 Redf. Am. Railw. Cas. 382. See also *Frazer v. Witt*, 17 W. R. 92.

²³ *Guildford v. Smith*, 30 Vt. 49; s. c. 2 Redf. Am. Railw. Cas. 388.

²⁴ *Ogle v. Atkinson*, 5 Taunt. 759; *Wilson v. Anderton*, 1 B. & Ad. 450. It is a good defence to the carrier that he has surrendered the goods according to the order of the bailor before he received counter orders from the superior owner, and until that the carrier cannot dispute the title of his bailor. Story Bailm. § 582.

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parties, there may have existed such an extent of bad faith as to vitiate the assignment or transfer of the bill of lading as between these particular parties.²⁵ So an order for the delivery of the goods, after their arrival in port, given to one who had paid the freight and held the assignment of the bill of lading, no delivery being made before notice to stop the goods *in transitu*, will not defeat the right of the vendor.²⁶

15. There seems to be some confusion in the cases in regard to the right of a third party to interpose his claim between the bailor and bailee. It is perfectly well settled that the bailee cannot defend against the claim of the bailor, by showing a better outstanding title to the thing in a third party, who has made no claim upon him.²⁷ But it is settled, that the bailee may defend against the claim of the bailor, by showing the goods have been taken from him by legal process.²⁸ Hence in cases of this kind the more common course is for the interposing claimant to resort to the writ of replevin; and sometimes to a writ of interpleader, * in order to settle the rights of the contending parties, if no other adequate remedy exists. (e)

16. But we apprehend there is no necessity for any such resort. Wherever the bailor obtains possession of the goods by force or fraud, or attempts to retain possession of them through the carrier, after his title has expired, in analogy to the case of landlord and tenant, the bailee may, upon having notice to surrender the goods to the rightful owner, under penalty of a suit, yield to the claim of the rightful proprietor, and defend against that of the fraudu-

²⁵ *The Argentina*, Law Rep. 1 Adm. 370; *Pease v. Gloahec*, Law Rep. 1 P. C. 219.

²⁶ *Coventry v. Gladstone*, Law Rep. 6 Eq. 44. And the arrival of the goods at the place of destination and notice to the consignee will terminate the transit. *Ex parte Gouda*, 20 W. R. 981.

²⁷ *Gosling v. Birnie*, 7 Bing. 339; *Holl v. Griffin*, 10 Bing. 246. The bailee cannot claim a higher title than the bailor. *Batuit v. Hartley*, 20 W. R. 898.

²⁸ *Burton v. Wilkinson*, 18 Vt. 186. If this defence were not valid, it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do.

(e) Where there are conflicting claims to the property, the carrier may hold it until he has had a reasonable time to investigate the question of ownership. In such case he may bring a bill of interpleader. *Ball v. Liney*, 48 N. Y. 6.

lent or wrongful bailor.²⁰ And, as is said before, the rule seems now to be settled, that in such case the carrier must deliver the goods to the rightful owner at his peril.²⁰

17. So where goods purchased are packed in cloths furnished by the vendee,²¹ or sent to an artist named by the vendor, to have the vendee's arms engraved upon them, the vendor to pay for such engraving, it was held not to amount to a complete delivery, so as to end the right of stoppage *in transitu*, the engraver being desired by both parties to return the goods to the vendor.²²

²⁰ *Infra*, § 188; *Swift v. Dean*, 11 Vt. 323; *Turner v. Goodrich*, 26 Vt. 707. The carrier, where goods are shipped in the name of one not the owner, may prove, in excuse for not delivering them to the shipper or his assigns, that they were taken from him by lawful process against the rightful owner against his will. *Van Winkle v. United States Mail Steamship Co.*, 37 Barb. 122; *Bates v. Stanton*, 1 Duer, 79.

²⁰ Story Bailm. § 450. *LITTLEDALE, J.*, in *Wilson v. Anderton*, 1 B. & Ad. 458.

²¹ *Goodall v. Skelton*, 2 H. Bl. 316.

²² *Owenson v. Morse*, 7 T. R. 64.

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*SECTION XXI.

Effect of Bill of Lading upon Carrier.

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| <ol style="list-style-type: none"> 1. Bill of lading receipting for goods in good order. Effect on carrier. 2. Questions of quantity and quality of goods cannot be raised where intermediate carriers are concerned. 3. Bill of lading, to what extent explained by oral evidence. 4. Express promise to deliver goods in good order, by a day named. 5. Stipulation for deduction from freight, in case of delay. 6. If carrier demand full freight, in such case he is liable to refund. 7. Goods must be forwarded by succeeding carrier specified in bill of lading. 8. Effect of separate bills of lading to different owners. 9. Right of consignee in unlading goods, bill requiring him to be ready to receive them on arrival. 10. Effect of indorsement and delivery of bill of lading. Passes all rights. 11. Exception of liability for leakage extends to extraordinary as well as ordinary leakage, if not caused by negligence. 12. But the carrier has the burden of proving no want of care on his part. 14. Passenger's baggage, whether at his own risk by reason of a notice printed on his ticket and posted in the company's office. | <ol style="list-style-type: none"> 15. Bill of lading construed with reference to the nature of the route and the course of business. 16. Succeeding carriers may pay back freight, in conformity with the bill of lading. 17. Bill conclusive against carrier, in favor of third parties who act in faith of it. 18. An exception in the bill of lading does not affect its general construction. 19. Bill evidence only, as between the parties, but conclusive as to parties acting in faith of it. 20. But in cases of fraud the estoppel will not bind the owner of a vessel or his interest in it. 21. Delivery must be made, if practicable, as agreed. Carrier must show loss caused by excepted risks. 22. Construction of terms of bill of lading affected by usage, &c. 23. Assignment of bill of lading transfers the title to goods, but not a claim for damages. 24. Freight secured by bill of lading will fail if goods destroyed. 25. Vendee must pay the price of goods in the mode stipulated, or he will acquire no title by the bill of lading. 26. Carrier must follow conditions of bill of lading. |
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§ 187. 1. It is common for a bill of lading (*a*) or the receipt for goods, executed by the station-agent, to describe them as in good condition. In such case this is always *prima facie* evidence against the carrier of that fact, even between the immediate par-

(*a*) The bill of lading is the contract, and its terms control. It need not be signed by the shipper to estab-

lish his assent thereto. *Piedmont Manufacturing Co. v. Columbia & Greenville Railroad Co.*, 19 S. C. 353.

ties to the contract, (b) and may become conclusive upon the carrier, where the consignee or other parties have acted upon the faith of such representation, and have made advances, or given credit, relying upon its truth.¹ (c)

¹ SHAW, C. J., in *Hastings v. Pepper*, 11 Pick. 43; 7 West. Law Jour. 302; *Price v. Powell*, 3 Comst. 322; *infra*, pl. 13, and note. Declarations of the master while in charge of the goods are evidence against the ship-owner. *McCotter v. Hooker*, 4 Seld. 497, where it is held that a mere receipt for the goods does not merge the previous oral agreement. And a receipt for a sealed package of money, "said to contain" a given amount, is not even *prima facie* evidence that it did contain that amount. *Fitzgerald v. Adams Express Co.*, 24 Ind. 447. Nor is a common carrier bound to receive money for transportation, unless it is properly secured and addressed; nor will the refusal to count the money raise any presumption against the carrier as to the amount. See, also, *Dunn v. Branner*, 13 La. An. 452..

But where the packages are described in the bill of lading "weight and contents unknown," and one of them is in bad condition on arrival, and the

(b) *Illinois Central Railroad Co. v. Cobb*, 72 Ill. 148. But such a recital is not conclusive between the parties. *Mitchell v. United States Express Co.*, 46 Iowa, 214.

(c) A recital that the carrier has received the goods is conclusive of that fact, as against one who has taken the bill for value, relying on such recital. *St. Louis & Iron Mountain Railroad Co. v. Larned*, 103 Ill. 293; *Wichita Savings Bank v. Atchison, Topeka, & Santa Fe Railroad Co.*, 20 Kan. 519; *Farmers' & Mechanics' Bank v. Erie Railway Co.*, 72 N. Y. 188; *Sioux City & Pacific Railroad Co. v. First National Bank*, 10 Neb. 556. And this, though the bill of lading is issued on a forged warehouse receipt. *Armour v. Michigan Central Railroad Co.*, 65 N. Y. 111. And though, in general, a bill of lading for goods not yet on board is void. *Stone v. Wabash, St. Louis, & Pacific Railway Co.*, 9 Brad. 48. But otherwise where the shipper, being permitted by the carrier to fill out the bill of lading, takes advantage of the opportunity to raise

the amount. *Lehman v. Central Railroad & Banking Co.*, 12 Fed. Rep. 595. And so when an agent issues a bill of lading fraudulently. *Baltimore & Ohio Railroad Co. v. Wilkens*, 44 Md. 11; s. p. *Erb v. Great Western Railway Co.*, 5 Can. Sup. Ct. 179. But see s. c. 3 Ont. Ap., where the court was divided. And see *Oliver v. Great Western Railway Co.*, 28 U. C. C. P. 143; and see *Brooke v. New York, Lake Erie, & Western Railroad Co.*, 21 Am. & Eng. Railw. Cas. 64, where it is held that the company is liable to an innocent third person deceived by a bill issued for goods not received, through collusion between the consignor and the shipping clerk of the company. And see *contra*, generally, *Robinson v. Memphis & Charleston Railroad Co.*, 9 Fed. Rep. 129. But whether the carrier is estopped to deny the contents of packages where the bill of lading describes the contents, *quære*. *Miller v. Hannibal & St. Joseph Railroad Co.*, 24 Hun, 607; s. c. 90 N. Y. 430.

* 2. But in regard to parties who have no direct interest in the goods, and no authority to adjust any deficiency or damage, who are but intermediate carriers, or middle-men, between the consignor and consignee, such questions cannot be raised, in an action for freight.²

mode of packing is such that it would not readily have been discovered, it requires proof that it was not so when delivered. *The Columbo*, 19 Law Rep. 376, *per* Nelson, J. In *McCready v. Holmes*, 6 Law Rep. 229, it was held, that though a carrier, in the absence of evidence of fraud or mistake, is concluded by the receipt or bill of lading, as to the quantity or amount of the goods shipped, yet, in an action for the freight, where the consignee has received the goods at the wharf, without qualification or reservation of the right to inspect, weigh, or measure them, and the carrier proves due care of them during the transit, and an actual delivery of all in his possession on his arrival, the burden of proof is on the consignee to show that a deficiency in the quantity specified in the bill of lading, afterwards discovered, is chargeable to the wrongful act or neglect of the carrier.

A bill of lading expressing receipt of goods "in apparent good order," may be explained by parol, and it may be shown that the goods had been in fact injured before received. *Blade v. Chicago, St. Paul, & Fond-du-Lac Railway Co.*, 10 Wis. 4. The bill of lading is presumptive evidence of the condition of the goods, and if the goods do not arrive, or arrive in bad condition, the carrier is *prima facie* responsible. *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339; *Great Western Railroad Co. v. McDonald*, 18 Ill. 172. A contract by which a carrier covenanted with a manufacturer of salt to carry from twelve hundred to five thousand bushels of salt annually for three years, gives the election as to the amount to the manufacturer. *White v. Toncray*, 9 Leigh, 347.

² *Canfield v. Northern Railroad Co.*, 18 Barb. 586, where a quantity of wheat was shipped at Detroit by water, for Ogdensburg, consigned to parties further on, care of the defendant at Ogdensburg. The master delivered the wheat to the defendant, but on measurement it fell short of the quantity named in the bill. The master demanded freight of defendant on the quantity carried and delivered, which defendant refused to pay, but offered to pay freight, deducting the deficiency in the wheat. On suit for the freight it was held, that the defendant was liable for the freight actually earned on the wheat delivered, the court saying that from delivery the law implied a promise on which the carrier might found an action for the freight; that that is the settled rule as regarded the *final* consignee; that there was no good reason why a rule, which looked to the rights of the carrier, "should not be applied to every consignee named, whether *final* or *intermediate*," and that the defendant was a middle-man, deriving all its powers and rights from the bill of lading, as intermediate consignee, and having no agency in behalf of the owner, and no power to make any adjustment. See also *Bissel v. Price*, 16 Ill. 408.

* 3. But where the bill of lading is given when the goods are so packed as to be incapable of inspection, and prove to have been in fact damaged when they were shipped, this may be shown by oral evidence.³ But as a bill of lading is *quasi* a negotiable instrument, if negotiated, it is binding upon the ship-owner.⁴ (d) In general a bill of lading is not to be contradicted and controlled as to the terms of the contract, by oral evidence.⁵ And where the carrier gave a receipt for goods to be forwarded, and specified among other things "one cradle," the cradle being wrapped in a piece of carpet and bound with cords, and the evidence went to show that the plaintiff told one of the defendants' agents that it contained a valise, it was held they were liable for the loss of the valise.⁶ (e)

³ *Gowdy v. Lyon*, 9 B. Monr. 112. And a bill of lading for a specified number of tons of iron, "weight unknown," binds the carrier, in the absence of fraud, to deliver only so much as he actually receives. *Shepherd v. Naylor*, 19 Law Rep. 43; *Bissel v. Price*, 16 Ill. 408.

⁴ *Howard v. Tucker*, 1 B. & Ad. 512. See also *Cox v. Peterson*, 30 Ala. 608.

⁵ *May v. Babcock*, 4 Ohio, 334; *The Reeside*, 2 Sumner, 567; *Angell Car.* §§ 228, 229; *infra*, § 187, note 9. And it is not competent to show a usage contradicting the terms of the bill of lading or the general liability of the carrier. *The Reeside*, *supra*; *Angell Car.* § 228; *Layword v. Stevens*, 3 Gray, 97. In *United States v. Kimball*, 13 Wal. 636, it was decided that a memorandum on the margin of a bill of lading would not control plain terms in the body of the instrument.

⁶ *Harmon v. New York & Erie Railway Co.*, 28 Barb. 323. See also *Mc-Millan v. Michigan Southern & Northern Indiana Railroad Co.*, 16 Mich. 79, by COOLEY, J.

(d) As to the merger of shipping agreements in the bill of lading subsequently issued, and the cases in which such agreements may be shown in evidence, see *Shiff v. New York Central & Hudson River Railroad Co.*, 81 N. Y. 638; *Missouri Pacific Railway Co. v. Beeson*, 12 Am. & Eng. Railw. Cas. 52; *Pennsylvania Railroad Co. v. Fairchild*, 69 Ill. 260. But where the shipper receives the bill before shipment he is bound by its terms, and cannot show prior parol agreement to vary them. *Hill v. Syracuse, Binghamton, & New York Railroad Co.*, 73 N. Y. 351; *Germania Fire Insurance Co. v. Memphis & Charleston Railroad Co.*, 7 Hun, 233. This seems to be the ground of distinction. If the goods have not been shipped, the acceptance of the bill will bind the shipper to its conditions; if they have been shipped, it will not. s. c. 72 N. Y. 90; *Michigan Central Railroad Co. v. Boyd*, 91 Ill. 268. He cannot allege ignorance of its contents. *Wertheimer v. Pennsylvania Railroad Co.*, 1 Fed. Rep. 232; *Mulligan v. Illinois Central Railroad Co.*, 36 Iowa, 181.

(e) *Supra*, note (c).

4. The stipulation in a bill of lading to deliver goods within a * specified time, in good order, the "dangers of the railway, fire, leakage, and other unavoidable accidents excepted," binds the carrier to deliver within the time absolutely, the exception having reference exclusively to the condition of the goods when delivered.⁷

5. And an agreement to deliver, at the place of destination, on a day named, with a provision that the carrier shall deduct a fixed sum from the freight for each day's delay beyond that time, was held to be an unconditional contract to deliver by the day named.⁷ But the reason and good sense of the case would seem to indicate that if the carrier made the stipulated deduction from freight, fixed in his contract for the delay, he was not liable beyond that for delay merely, and so the court seems to have viewed the subject.

6. But where the carrier in such case demanded full freight, not consenting to deduct the price fixed in the contract for the delay, which was paid, it was very justly held to be a payment by duress of circumstances, and the excess recoverable of the carrier.⁷

7. In an important case,⁸ determined by an experienced court, it was held that where the bill of lading required the goods to be reshipped at an intermediate port, by a particular ship, and they were reshipped in another ship, that the contract had not been complied with, and that the carriers must be considered as insur-

⁷ *Harmony v. Bingham*, 1 Duer, 209. In this case the covenants to deliver in a specified time, and in good order, and for the deduction, in case of failure, were separate covenants. The recovery was in fact limited to the damages specified in the contract, thus making, in effect, a contract to deliver by a certain day, or deduct a certain sum from the freight for each day's delay. See *Place v. Union Express Co.*, 2 Hilton, 19.

⁸ *Bazin v. Richardson*, Law Rep. 129; *Merrick v. Webster*, 3 Mich. 288. And in *Bristol v. Rensselaer & Saratoga Railroad Co.*, 9 Barb. 158, it was held, that the receipt of a package marked "L. W. B., care of S. W., Troy," by a railway agent, implied the duty to deliver, according to the mark, and nothing more, although S. W. is another agent of defendants. See also *Fearn v. Richardson*, 12 La. An. 752; *Hatchett v. The Compromise*, 12 La. An. 783. In *Fraser v. Telegraph Construction Co.*, Law Rep. 7 Q. B. 566, where the bill of lading contained the words "shipped on board the steamship *Hibernia*," with leave "to transship the goods on board by any other steamer," it was held to bind the carrier to the use of a ship on which the principal motive power was steam.

ing the goods against loss, even if it arose from causes excepted by the bill of lading. And where goods are delivered to a railway company, for carriage, and a receipt taken by the consignor, upon which he obtains an advance by the consignee, the consignor subsequently obtaining a redelivery of the goods to himself, * and the company in consequence being compelled, under threat of legal proceedings against them, to refund to the consignee the money advanced by him, it was held they might recover the amount so paid of the consignor.⁹

8. If the shipper give separate bills of lading to the different owners of wheat shipped under one contract in gross, he is liable to each owner for the conversion of his portion.¹⁰

9. There is an English case, in regard to the respective rights of carriers and consignees, depending upon the construction of a bill of lading, of some practical importance. By the terms of the bill of lading the consignee was bound to be ready to receive the goods simultaneously with the ship being ready to unload, and in default the master might land the goods at the expense of the consignee. The consignee not furnishing lighters in time, after due notice of the arrival of the ship, the goods were partly landed on the wharf, when the consignee arrived with lighters and demanded that the remainder should be delivered into the lighters; which was refused, and the unloading completed on the wharf. A suit being brought for the wharfage due, it was held, that, in the absence of evidence that the carriers would be greatly injured thereby, the consignee was entitled to have the delivery completed into the barges.¹¹

10. The transfer by indorsement and delivery of the bill of lading passes to the indorsee all vested as well as contingent rights of action, even though the goods are not, at the time of the indorsement, still at sea.¹²

* *Midland Great Western Railway Co. v. Benson*, 30 Law T. 26. A suit against a carrier, under the code, for breach of his contract, as such, must be on the bill of lading, where such bill is given and embraces the terms of the contract. The terms of such bill cannot be varied by parol evidence. *Indianapolis & Cincinnati Railroad Co. v. Remmy*, 13 Ind. 518.

¹⁰ *Wright v. Baldwin*, 18 N. Y. 428.

¹¹ *Wilson v. London & Italian Steamship Co.*, Law Rep. 1 C. P. 61; s. c. 12 Jur. N. s. 52.

¹² *Short v. Simpson*, Law Rep. 1 P. C. 248; s. c. 12 Jur. N. s. 258.

11. Where the bill of lading in the usual form contained the memorandum "weight, measurement, and contents unknown, and not accountable for leakage," it was held to protect the carrier as to all leakage, whether ordinary or extraordinary, unless caused by negligence.¹³ (f)

* 12. Where the bill of lading exempted the carrier from responsibility "for rust or breakage," proof of injury to the goods by breakage nevertheless makes out a *prima facie* case of negligence against him; and he must then show the exercise of due care and vigilance on his part to prevent the injury, unless the nature of the injury or of the goods furnishes evidence that due care and diligence could not have prevented the injury.¹⁴

13. The statement in a receipt or bill of lading, that goods were received in good order, is not, as already stated, (g) conclusive

¹³ *Ohrloff v. Briscall*, Law Rep. 1 P. C. 231; s. c. 12 Jur. n. s. 675. An exception in the bill of lading of all responsibility for loss on "perishable property" will not extend to mature, merchantable corn. *Illinois Central Railroad Co. v. McClellan*, 54 Ill. 58.

¹⁴ *Steele v. Townsend*, 37 Ala. 247. But in most cases where a risk is excepted in the bill of lading, and it is attempted to charge the carrier by reason of negligence, the burden of proof is on the owner of the goods. *Supra*, § 167, note 9; *supra*, § 175, note 22.

(f) Where a bill of lading for a cask excepts losses from leakage, and the cask arrives in good order but empty, it is for the carrier to prove that the loss occurred from the excepted risk. *Arend v. The Liverpool, New York, & Philadelphia Steamship Co.*, 5 Chicago Legal News, 161.

(g) Delivery of a bill of lading for value is in law a delivery of the goods, without either possession or notice to carrier or warehouseman. *Forbes v. Boston & Lowell Railroad Co.*, 133 Mass. 154. s. p. *Jeffersonville Railroad Co. v. Irvin*, 46 Ind. 180. And see *Trayer v. Mullaly*, 12 Mo. Ap. 568. Indorsement is not necessary. *Merchants' Bank v. Union Railroad & Transportation Co.*, 69 N. Y. 373. s. p. *Forbes v. Fitchburg Railroad Co.*, 9 Am. & Eng. Railw. Cas. 80; West-

ern Union Railroad Co. v. Wagner, 65 Ill. 197. As to negotiability of bills of lading, see *Robinson v. Memphis & Charleston Railroad Co.*, 9 Fed. Rep. 129; *Newcomb v. Boston & Lowell Railroad Co.*, 115 Mass. 290; *Walker v. Detroit, Grand Haven, & Milwaukee Railroad Co.*, 49 Mich. 446; *Stone v. Wabash, St. Louis, & Pacific Railway Co.*, 9 Brad. 48; *Baltimore & Ohio Railroad Co. v. Wilkens*, 44 Md. 11. Though negotiable by statute, it has not all the incidents of commercial paper, and the rule that a *bona fide* purchaser of a lost or stolen bill of exchange payable to bearer or indorsed in blank need not look beyond the instrument itself, has no application. *Shaw v. Merchants' National Bank*, 101 U. S. 557.

evidence of that fact; but it is competent to show such was not the fact.¹⁵ By such a receipt the onus is put upon the carrier, in an action for the non-delivery of the goods, to show that the goods were not in the condition stated in the receipt.¹⁵ And where the evidence is conflicting, and leaves it doubtful whether the alleged default occurred while the carrier sued had charge of the goods or while they were in the custody of another, the court will not disturb the verdict.¹⁵ And a carrier who receives goods from another carrier is responsible directly to the owner of the goods.¹⁵

14. A passenger upon a railway, having a free pass for himself, purchased a ticket for his wife, who accompanied him, and put her trunk in charge of the proper agents of the company, without informing them that the trunk was not his own. He was held entitled to recover against the company for the loss of the trunk, and was held not affected by any notice on the check delivered to him, having printed on its face, "Look on the back," the same notice being posted in the office of the company, among others which it appeared the plaintiff had read.¹⁶

15. A bill of lading for an entire route of transportation consisting of two divisions, is to be construed with reference to the * nature of the transit, and the natural and ordinary course of transacting the business connected with the transportation. If in such transportation any obstacle should intervene, which by the regular course of the trade is liable to occur, and retard the forwarding for a time, the master cannot, on account of not being able to find storage at the port, turn about and carry the cargo to some other port and there store it and depart. He should wait, and, where there is easy telegraphic communication, inform the consignees of his difficulty, that they may, if they desire, send him instructions.¹⁷

¹⁵ *Illinois Central Railroad Co v. Cowles*, 82 Ill. 117. The bill of lading is binding unless disproved. *Coulthurst v. Sweet*, Law Rep. 1 C. P. 649. The shipper cannot recover as damages for delay in transportation the premium paid by him for insurance on the goods while the vessel was lying in a port to which she was driven for repairs by reason of her unseaworthiness. The carrier, in such case, becomes the insurer. The common carrier owes indemnity to the shipper of goods for delay in the transportation, and legal interest on the price of the goods during the period of the delay may be recovered, as the measure of such indemnity. *Murrell v. Dixey*, 14 La. An. 298.

¹⁶ *Malone v. Boston & Worcester Railroad Co.*, 12 Gray, 888.

¹⁷ *The Convoy's Wheat*, 3 Wal. 225.

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16. It has been held, that a custom to treat the statement of the amount of the goods in a bill of lading, as conclusive upon the carrier, is unreasonable and void.¹⁸ But where the last carrier in a line paid the freight to the former carriers, according to the bill of lading, and in compliance with the custom of the company known to the consignee, it was held they were not responsible for any deficiency in the weight of the cargo, which appeared on reweighing at the termination of the transit, it not being the usual custom of such company to reweigh at such point, and this understood by the consignee.¹⁹

17. A bill of lading has been held conclusive against the master of a vessel in favor of a consignee, not party to the contract, but who had advanced money on the faith of its statements as to the amount and condition of the property, and which from the whole instrument and the usages of trade may be regarded as absolute statements from the master's own knowledge, but it is not conclusive against the owners as to property not shipped, the master having no authority in regard to that.²⁰ But such bill of lading is not conclusive against the master as to the amount of goods put on board, and the consignee cannot recover against the master for the full amount named in the bill of lading, being more than the amount actually put on board, where he has not paid for the goods * on the faith of the bill of lading, and is only to pay the shipper for what he receives, unless he can recover of the master the difference between this amount and the amount named in the bill of lading.²¹

18. Where the contract of affreightment was general, without naming any exceptions to the risk, and the bill of lading con-

¹⁸ *Strong v. Grand Trunk Railway Co.*, 15 Mich. 206.

¹⁹ *Naugatuck Railroad Co. v. Beardsley Scythe Co.*, 33 Conn. 218.

²⁰ *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104; *Hubbersty v. Ward*, 8 Exch. 330; *Jessel v. Bath*, Law Rep. 2 Exch. 267. In the case last cited, a printed clause in the bill of lading, "contents and weight unknown," controlled the written entry of the goods as of a certain estimated weight. See also *Backus v. The Marengo*, 6 McLean, 487; *Byrne v. Weeks*, 7 Bosw. 372; *Sears v. Wingate*, 3 Allen, 108.

²¹ *Hall v. Mayo*, 7 Allen, 454; *Ryder v. Hall*, 7 Allen, 456. See also *Kelly v. Bowker*, 11 Gray, 428. The general proposition, that the bill of lading is *prima facie* evidence of the facts recited therein, is maintained in a large number of cases. *Benjamin v. Sinclair*, 1 Bailey, 174; *O'Brien v. Gilchrist*, 34 Me. 554; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339; *Allen v. Bates*, 1 Hilton, 221.

tained the clause, "the dangers of the seas only excepted," it was held not to enlarge the responsibility of the carriers so as to render them liable for loss by the public enemy.²³

19. The bill of lading, as to the receipt of the goods, is not held conclusive upon the parties to the instrument, but only in the nature of evidence, like any other receipt, good until contradicted or qualified by other evidence.²³ But as to third parties, who may have been induced to deal with the goods on the faith of the facts recited in the bill of lading, such recital must be treated as an estoppel upon the parties to the instrument.²⁴ But this principle will not apply in favor of a party who derived his title to the goods before, and independent of, the bill of lading.²³

20. As a general principle the contract of the master in regard to freight binds the ship and the general owner of the ship, although chartered by another, and the master is acting under the orders of the charterer.²⁵ But no such implication arises in reference to bills of lading for property not shipped, designed to be instruments of fraud, and they create no lien upon the interest of the general owner, although the charterer was the perpetrator of the fraud. And although the charterer is estopped in such case from showing that no property was shipped, that estoppel will not bind the general owner.²⁵

²³ *Gage v. Tirrell*, 9 Allen, 299. See also *Byron v. The Belfast*, 40 Ala. 184. When the bill of lading contained an exception of "all loss and damage . . . from any neglect or default whatsoever of the pilot, master, or mariners," it was held not to extend to the act of the mate, after the ship reached port, in delivering the goods to a carman, who was not employed by the consignees, whereby they were lost. *Guillaume v. Hamburgh & American Packet Co.*, 42 N. Y. 212. And an exception in the bill of lading of all loss by fire was held not to extend to loss by fire communicated by a spark from the locomotive, which escaped by reason of the engine not being properly guarded as to the escape of sparks. *Steinweg v. Erie Railway Co.*, 48 N. Y. 123. An exception of the "dangers of lake navigation" will embrace the shallowness of the water at the entrance of the harbor. *Transportation Co. v. Downer*, 11 Wal. 129. But even under such an exception, it is here held that the plaintiff may recover by showing that the carrier might have escaped the peril by the use of proper care and skill; but the burden of proof will be on the owner of the goods in such case.

²⁴ *Meyer v. Peek*, 28 N. Y. 590.

²⁵ Statute 18 & 19 Vict. c. 111, § 3; *The Freeman v. Buckingham*, 18 How. 182.

²⁶ *The Freeman v. Buckingham*, 18 How. 182.

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21. Under a bill of lading stipulating for the delivery of the goods at a particular place, this must be done, if it may be done with safety. But where the goods are lost by perils excepted in the * bill of lading, the burden of showing that fact rests upon the carrier.²⁶

22. Terms used in a bill of lading, as in other written instruments, will receive such construction as the usage of the business requires.²⁷ But a bill of lading acknowledging the receipt of goods "to be forwarded across the Isthmus," and then to be reshipped, will not make the carrier a mere forwarder as to the transportation across the Isthmus, but he will be regarded as a carrier notwithstanding the use of the term "forwarded," that being used here in the popular sense of "carried."²⁸

23. In a very elaborate opinion²⁹ by SHAW, C. J., after two arguments, and one decision of the court to the contrary, the cases are carefully reviewed, and the proposition maintained, that the indorsement of the bill of lading only transfers the title to the goods, and not the right of action in the shipper for any injury done during the transportation, and that an action may be maintained in the name of the shipper to recover for such injury, notwithstanding he has parted with all interest, general or special, in the goods.

24. Where the bill of lading stipulates for the payment of freight within three days after the arrival of the cargo, and before delivery, and the cargo arrive safely in port, but within the three days and before it was demanded, it was destroyed by an accidental fire, compelling the scuttling of the ship and the destruction of the goods, it was held the carriers could not recover the freight.³⁰

25. Where the bill of lading is sent to the consignee or vendee of the goods, accompanied with a bill of exchange to cover the price, it is a well understood rule that the bill of exchange must be accepted or the bill of lading cannot be retained, and unless that is done, the vendee will acquire no right of property by the delivery and retention of the bill of lading; and the vendors may lawfully repossess themselves of the goods.³¹

²⁶ *Shaw v. Gardner*, 12 Gray, 488. See *supra*, pl. 12, note 14.

²⁷ *Wayne v. The General Pike*, 16 Ohio, 421.

²⁸ *Simmons v. Law*, 8 Bosw. 213.

²⁹ *Blanchard v. Page*, 8 Gray, 281; s. p. *Joseph v. Knox*, 3 Camp. 320.

³⁰ *Duthie v. Hilton*, Law Rep. 4 C. P. 138.

³¹ *Shepherd v. Harrison*, Law Rep. 5 H. L. 116.

26. Where the bill of lading expressly stipulates that the carrier is to deliver goods on payment of freight and presentation of a duplicate of the bill of lading, he is bound to adhere to these terms, which are for the security of the consignor.³²

³² *McEwen v. Jeffersonville, Madison, & Indianapolis Railroad Co.*, 33 Ind. 368.

*SECTION XXII.

Carriers' Lien for Freight.

1. In general, carrier has a lien for freight, but damage to goods may be deducted, and freight must be earned.
2. But if freight through be paid to first carrier, lien in favor of succeeding carrier does not attach.
- 3-8. Carrier acquires no valid lien where it receives the goods from a wrongdoer without consent of the owner.
9. Passenger carrier has lien on baggage for fare.
10. Carriers have no lien for general balance of account.
11. Lien may be waived by delivery of goods, or the like.
12. But not if delivery is obtained by fraud. Goods will be then restored by replevin.
13. In general, last carrier in the route may detain goods till all freight is paid.
14. Carrier cannot sell goods in satisfaction of lien.
15. Owner may pay freight, and sue for goods lost.
16. Carrier is bound to keep goods reasonable time, if refused by consignee.
17. Lien does not cover expense of keeping, if it is kept against the will of owner.
18. Lien covers back charges.
19. Lien for freight in favor of succeeding carrier not affected by defaults of the first carrier.
20. Carriers have no lien for freight on goods carried for the government.
21. Owner accepting goods at intermediate place, bound to pay freight *pro rata*. Goods paid for, freight may be deducted.
22. If goods are unlawfully detained, consignee, being ready to pay freight, may maintain trover, without formal tender.
23. Consignees indorsing bill of lading, without recourse, or a mere servant or agent, not responsible for freight.
24. Waiver of lien presumed from unconditional delivery.
25. Delivery of part of cargo no waiver as to whole. Question for jury.
26. No lien for dead freight. Owner of vessel chartered to another has no lien for hire of vessel. *Sed quare*.
27. No lien for general balance can be secured by notice or custom. Such custom void.
28. Acts by carrier amounting to conversion.
29. No lien for freight until voyage begins, nor where contract is for payment after delivery.
30. Freight may be demanded before delivery. Only payable according to bill of lading.
31. Lien on goods at end of voyage for all the freight earned.
32. Where carrier claims more than is due, it dispenses with tender of amount actually due.
33. Freight not due until after full performance of carrier's duty. May have lien and action for freight at same time.
34. Payment in advance not strictly payment, but a deposit to secure payment, and may be recovered on failure of the carrier to perform.
35. Carrier may insist on full freight, where the goods are taken from him without his fault; but if taken by mutual consent, he can claim only *pro rata*.
36. Acceptance of goods by the carrier raises no implication of release for any prior default.
37. Carrier can maintain no lien for transportation, except within the line of his duty.
38. Carrier must forward goods beyond his line by the line by which the shipper directs.

§ 188. 1. As a general rule the carrier is entitled to a lien for freight upon the goods carried.¹ (a) But if he once deliver the goods, this lien is waived.² Or if the goods be damaged in a manner for which the carrier is liable, the owner may deduct the amount of injury * from the freight.³ (b) But the goods must be

¹ *Skinner v. Upshaw*, 2 Ld. Raym. 752. And so also for advances made for freight and storage by other carriers. *White v. Vann*, 6 Humph. 70; *Galena & Chicago Railroad Co. v. Rae*, 18 Ill. 488.

² *Boggs v. Martin*, 13 B. Monr. 239, 243. This lien extends to all the freight on the goods throughout their transportation which may be advanced by the last carrier or warehouseman. *Bissel v. Price*, 16 Ill. 408.

³ *Boggs v. Martin*, 13 B. Monr. 239, 243; *Snow v. Carruth*, 19 Law Rep. 198, *per SPRAGUE*, J. where *Davidson v. Gwynne*, 12 East, 880, and *Sheelds v. Davies*, 4 Camp. 119; s. c. 6 Taunt. 65, are considered and overruled, so far as this question is concerned. The right of the owner of the goods to insist on any damage done the goods, for which the carrier is liable, by way of recoupment or deduction from the freight, is well established in this country, and is a most elementary principle, as applicable to analogous cases. *Bartram v. McKee*, 1 Watts, 89; *Leech v. Baldwin*, 5 Watts, 446; *Humphreys v. Reed*, 6 Whart. 435; *Edwards v. Todd*, 1 Scam. 462. But it is said the carrier is not liable to have damage done by some other party in the transit deducted from his lien. *Bowman v. Hilton*, 11 Ohio, 303. But it is no answer to the carrier's lien that the goods have been damaged during the transit by inevitable accident, to an amount exceeding that of the lien, provided they were still of sufficient value to satisfy it. *Lee v. Salter*, Hill & D. 163; s. c. 2 Redf. Am. Railw. Cas. 219. And where the damage done to the goods by the carrier's default exceeds the freight, and the carrier refuses to deliver the goods until the freight is paid, the owner may recover them by replevin. *Dyer v. Grand Trunk Railway Co.*, 42 Vt. 441. And where goods were carried by a continuous line of steamboats and railway from New York to Fitchburg, being delivered on the pier of the steamboat company in good condition, and having been injured before their arrival at Fitchburg to an amount exceeding the freight, it was held no defence against the claim to set off the damage to the goods against the claim for freight, at the suit of the last railway company in the line of transportation, that the damage accrued to the goods before the

(a) And the carrier has a right to hold the goods until freight is paid or tendered, and a demand made. *Ohio & Mississippi Railway Co. v. Noe*, 77 Ill. 513. There is no lien, however, where the goods are sent not according to the contract with the shipper, but by some other route. *Marsh v. Union Pacific Railway Co.*, 3 McCrary, 236. Nor can either party create a lien, where the law gives none, without the assent of the other, — a lien, e. g., for demurrage. Published rules of the carrier, even if known to the consignor, will not affect it. *Chicago & Northwestern Railway Co. v. Jenkins*, 103 Ill. 588.

(b) And it makes no difference whether the amount is large or small. *Hoyt v. Sprague*, 61 Barb. 497.

carried and ready for delivery, or the carrier has no right to detain them for freight, the performance of the contract on the part of the carrier being a condition precedent to the right to demand freight.⁴

2. In general the consignor of goods is *prima facie* liable to the carrier for freight, but the consignee may, by the implied understanding at the time of shipment, and by the relation he sustains to the goods, be the only party liable; or the consignor and consignee may both be liable, either jointly or severally.⁵ But the owner of the goods is always the proper party to bring an action for the loss or injury of the goods, and may generally be held liable for the freight.⁶ The person receiving the goods is responsible for freight, and damages by injury to the goods or non-delivery * may be first deducted.⁷ But the relation of debtor and creditor must exist between the carrier and the owner of the goods, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien.⁸ Hence where one shipped goods at Burlington, upon Lake Champlain, for Detroit, Michigan, care of D., by common carriers, through whom he had previously transported goods to Detroit, and paid the freight in advance; and the goods coming into the possession

goods were laden on the boat, and without negligence on the part of the carriers. The court say the carrier, in such case, may, if he choose, make a special acceptance of the goods, as a warehouseman, during the period between the delivery and the departure, but unless that is shown, he is liable, as carrier, from the time of the delivery for transportation. *Fitchburg & Worcester Railroad Co. v. Hanna*, 6 Gray, 539.

⁴ *Palmer v. Lorillard*, 16 Johns. 348; s. c. 2 Redf. Am. Railw. Cas. 185. Opinion of KENT, Chancellor, and cases cited.

⁵ *Moore v. Wilson*, 1 T. R. 659.

⁶ *Danes v. Peck*, 8 T. R. 330.

⁷ *Hill v. Leadbetter*, 42 Me. 572; *supra*, note 3.

⁸ *Fitch v. Newberry*, 1 Doug. Mich. 1. So, too, if the carrier detains the goods for the payment of a sum beyond the freight, the owner being ready to pay freight, he and his agents are liable in trover, and in such case it is not requisite to make a formal tender of freight. *Adams v. Clark*, 9 Cush. 215; *Isham v. Greenham*, 1 Handy, 357. And it was held in *Schneider v. Evans*, 9 Am. Law Reg. N. S. 536; s. c. 25 Wis. 241, that where the first carrier in an extended line accepted the freight through, but at less than the usual rate, the last carrier might detain the goods till the deficiency was paid, and thus turn the owner over to the first carrier for redress; but the case may be questionable.

of another line of carriers at Troy, N. Y., without the knowledge of the owner, and being by them transported to Detroit, consigned to the care of F., who was a warehouseman and forwarder, and who, without knowledge of the facts stated, advanced the freight due upon the goods from Troy to Detroit, and refused to surrender them to the owner until reimbursed the amount; in an action of replevin for the goods it was held, that the owner was entitled to possession of the goods, without payment of the freight advanced by F.⁸ (c)

8. A common carrier, who innocently receives goods from a wrongdoer, without the consent of the owner, express or implied, has no lien upon them for their carriage, as against such owner;⁹ not even for freight which he has paid to a previous carrier, by whom the owner had directed them to be carried.¹⁰ And a lien for freight, where it exists, can only be asserted by the party in whose favor it was created, or some one acting in privity with such party; but such lien presents no obstacle to a recovery by the general owner of the goods, against a mere wrongdoer.¹¹

4. Mr. Justice FLETCHER, in delivering the opinion of the court, in the case just cited,⁹ alludes to the fact that so little is found in the books upon this point, and the dictum, in *York v. Grenaugh*,¹² by * Lord Chief Justice HOLT, that in the case of the Exeter carrier, it was held that where one who stole goods delivered them to a carrier, who transported them by his order, the carrier thereby acquired a lien upon the goods for the freight, and that this had been adopted by some of the elementary treatises, and

⁸ *Robinson v. Baker*, 5 Cush. 137; s. c. 2 Redf. Am. Railw. Cas. 212.

¹⁰ *Stevens v. Boston & Worcester Railroad Co.*, 8 Gray, 262.

¹¹ *Ames v. Palmer*, 42 Me. 197.

¹² 2 Ld. Raym. 866, where it was held that an innkeeper might detain a horse for his keep, although put at the stable by one who came wrongfully by him. But that case differs from that of a carrier, as the innkeeper cannot ordinarily demand pay in advance. And this point is reaffirmed in *Threlfall v. Borwick*, 20 W. R. 1032.

(c) Where, however, the freight goes over two or more roads, payment to the agent of the receiving road of what he says will pay freight through, and the taking of a receipt for "freight charges paid through," will not deprive the other roads of their lien for their part of the freight, no arrangement existing between the roads, and the agent having no authority from the other roads. *Wolf v. Hough*, 22 Kan. 659.

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by the courts even, *arguendo*, sometimes,¹³ and after referring to the case of *Fitch v. Newberry*,⁸ thus continues : —

5. "This decision is supported by the case of *Buskirk v. Purington*, 2 Hall, 561. There property was sold on a condition which the buyer failed to comply with, and shipped the goods on board the defendants' vessel; on the defendants' refusal to deliver the goods to the owner, he brought trover, and was allowed to recover the value, although the defendants insisted on their right of lien for the freight.

6. "In the case of *Saltus v. Everett*,¹⁴ it is said, 'The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser, under a defective title, cannot hold against the proprietor.' There is no case to be found, on any reason or analogy anywhere suggested in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently.

7. "The reason, and the only reason given, is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him. And he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods unless the freight is first paid to him, and he may in all cases secure the payment of the carriage in advance.

8. "Upon the whole the court are satisfied that upon the adjudged cases, as well as on general principles, no right of lien for freight can grow out of a wrongful bailment of the goods to the carrier." In a recent English case it was held, that where carriers * receive goods to be carried, there is no estoppel precluding them from disputing the title of the bailor. To trover by such a bailor it is an answer that the carriers have delivered the goods to the true owner at his request.¹⁵

¹³ *King v. Richards*, 6 Whart. 418. The court held here that the carrier might lawfully deliver the goods to the rightful owner, and defend against the claim of the bailor, or his assignee, for value on that ground.

¹⁴ 20 Wend. 267, 275.

¹⁵ *Sheridan v. New Quay Co.*, 4 C. B. N. S. 618; s. c. 5 Jur. N. S. 248.

9. The carrier of passengers has a lien for his charges upon the baggage, but not upon the person of the passenger.¹⁶

10. And neither carriers nor warehousemen have any lien upon goods for a general balance of account against the owner,¹⁷ more than in other cases of lien.

11. As we have said, this lien may be waived by delivery of the goods and the other usual modes of waiving liens, as by accepting security for the freight on time, or where, by the terms of the contract of carriage, the carrier is not to receive pay at the time of the delivery of the goods.¹⁸

12. And where the carrier is induced to deliver the goods to the consignee by a false and fraudulent promise of the latter that he will pay the freight as soon as they are received, the delivery will not amount to a waiver of the lien, but the carrier may disaffirm and sue the consignee in replevin.¹⁹

13. In general the last carrier may detain the goods, not only till his charges, but until all the charges during the transit, are paid. If this is not settled by law, in any place, the custom and course of trade may be shown.²⁰ And in such case and in all cases of lien for freight, if the goods be delivered without exacting payment of the dues, the owner is liable to the party entitled to demand the same, whether they consist of sums due for services, or advances * for the services of other parties, made in the due

¹⁶ Story Bailm. § 604; *Wolf v. Summers*, 2 Camp. 631; *McDaniel v. Robinson*, 26 Vt. 316.

¹⁷ *Rushforth v. Hadfield*, 6 East, 519; *Hartshorn v. Johnson*, 2 Halst. 108; *Green v. Farmar*, 4 Bur. 2214; *Leonard v. Winslow*, 2 Grant Cas. 139. And in *Hale v. Barrett*, 26 Ill. 195, it was held, that where goods belonging to different owners are shipped by one bill of lading, the consignee cannot hold the goods of one for the charges on the goods of the other. If a warehouseman or consignee deliver goods on the receipt of a promissory note of the owner for charges, he loses his lien. *Ib.*

¹⁸ *Crawshay v. Homfray*, 4 B. & Ald. 50.

¹⁹ *Bigelow v. Heaton*, 6 Hill, 43; s. c. 4 Denio, 496. See also *Hays v. Riddle*, 1 Sandf. 248. And where the conductor of a passenger train snatched a parasol from a passenger in order to secure the payment of fare, the company was held responsible in an action of tort. *Ramsden v. Boston & Albany Railroad Co.*, 104 Mass. 117.

²⁰ *Lee v. Salter, Hill & D.*, 163; s. c. 2 Redf. Am. Railw. Cas. 219. This lien includes all charges of warehousemen and forwarders during the transit. See also *Cooper v. Kane*, 19 Wend. 386; *Dawson v. Kittle*, 4 Hill, 107, as to the effect of usage.

course of business.²¹ But this only extends to charges strictly connected with the expense of transportation.²²

14. Neither the carrier nor any other bailee having a lien can sell the goods, at common law, in satisfaction of the lien. The appropriate remedy, in such case, is in equity.²³

15. Payment of freight to a common carrier for the portion of a consignment delivered is no presumptive evidence, either of the delivery of the remainder of the consignment, or of release from liability on that account. The consignee in such case has an option, either to set off the loss against the freight, or pay freight and sue for the goods not delivered.²⁴

16. But where the consignee declines accepting the goods, on the ground that the charges are unreasonable, or for any other cause, when the carrier is not in fault, he must still keep the goods safely for a reasonable time at least. (*d*) And where they were, under such circumstances, immediately returned to the consignor, in a remote place, it was held the carrier was liable for the damages sustained, and there being a count in trover, it is intimated that such act amounts to a conversion.²⁵

17. But the law gives no right to add to a lien upon a chattel a charge for keeping it till the debt is paid, when it is detained against the will of the debtor.²⁶

18. A warehouseman, with whom goods carried by a railway company are stored, may retain possession of the same, where

²¹ *Jones v. Pearle*, 1 Stra. 556; *Pothonier v. Dawson*, 1 Holt N. P. 383; 2 Kent Com. 642; *Hunt v. Haskell*, 24 Me. 339.

²² *The Virginia v. Kraft*, 25 Mo. 76.

²³ *Fox v. McGregor*, 11 Barb. 41; *Jones v. Pearle*, 1 Stra. 556, and cases *supra*, note 21. See also *Briggs v. Boston & Lowell Railroad Co.*, *infra*, note 28; *Doane v. Russell*, 3 Gray, 382.

²⁴ *Moore v. Patterson*, 28 Penn. St. 505.

²⁵ *Crouch v. Great Western Railway Co.*, 31 Law T. 38; s. c. 2 H. & N. 491; *supra*, § 175, pl. 17, note 20.

²⁶ *Somes v. British Empire Shipping Co.*, 8 H. L. Cas. 338; s. c. 6 Jur. n. s. 761, affirming the decision of the Queen's Bench and the Exchequer Chamber. This was the case of a ship detained till repairs were paid, and the claim was for the use of defendants' dock during the term the ship was detained.

(*d*) But where the consignee is in default in receiving the goods, so that the carrier has a right to warehouse them, he does not lose his lien for the freight, where he deposits them subject thereto. *Western Transportation Co. v. Barber*, 56 N. Y. 544.

so instructed by the company, until the back charges thereon are paid.²⁷ (e)

* 19. If an injury occurs, or any loss ensues, through error of the first carrier, to whom the owner's instructions were communicated, in billing the goods to a point beyond its line other than their destination, so that the goods are sent to a wrong place, this will not exonerate the owner from responsibility for the charges of transportation by the subsequent carriers, or affect the validity of their lien for such charges as they have themselves earned or advanced to the other companies, from the point of original departure.²⁸

20. But common carriers acquire no such lien upon goods transported for the national government, as to justify their detention.²⁹

21. If the owner of the goods accept them at any intermediate place short of the original destination, he will be liable to pay freight *pro rata*.³⁰ And where the carrier pays for the loss of the goods, it is equivalent to delivery, and he is entitled to deduct freight.³¹

²⁷ Alden v. Carver, 13 Iowa, 253. But the carrier cannot insist on payment of freight before he allows the consignee to inspect the goods. Lanata v. The Henry Grinnell, 13 La. An. 24.

²⁸ Griggs v. Boston & Lowell Railroad Co., 6 Allen, 246. The distinction made by the court between this case and that of Robinson v. Baker, 5 Cush. 137, is that in that case the forwarder had no direction and no agency on the part of the owner in forwarding the goods, while here he was acting strictly as the agent of the owner, who must therefore be held responsible for his default. And the fact that there is a compact among all the connecting lines for each successive carrier to deliver to the next and receive his own freight and advances, will not render the last carrier responsible for any default of the former carrier. Darling v. Boston & Worcester Railroad Co., 11 Allen, 295; Carson v. Harris, 4 Greene Iowa, 516; Wilson v. Harvey, 32 Penn. St. 270.

²⁹ Dufolt v. Gorman, 1 Minn. 301.

³⁰ Lorent v. Kentring, 1 Nott & McC. 132; *infra*, pl. 33, *et seq.*

³¹ Hammond v. McClurg, 1 Bay, 101.

(e) And a railroad company has a lien for back charges, though they exceed the guaranteed rate, the company having taken the goods by direction of the owner from a place to which they had come through some error, and carried them to their destination. Vaughan v. Providence & Worcester Railroad Co., 13 R. I. 578; Knight v. Providence & Worcester Railroad Co., 13 R. I. 572. See Western Transportation Co. v. Hoyt, 69 N. Y. 230.

22. The consignee who is ready to pay freight may maintain trover for the goods on a refusal to deliver them, there being no other legal claim upon them, and he is not bound first to make a formal tender of the freight.³² (f)

23. Where the consignee indorsed the bill of lading to the wharfinger, but not so as to pass the property, in these words: "Deliver to A. or order, looking to him for all freight without recourse to us;" and the ship-owners accepted the indorsement and delivered the goods accordingly, it was held they could not sue the consignee for freight.³³ A mere agent to receive the delivery of goods for another is not personally responsible for freight.³⁴

* 24. A lien for freight is waived by unconditionally delivering the goods, on the bill of lading, and allowing the larger portion to be placed upon another ship for a foreign port, the assignee being in good credit. And the waiver is not avoided by his estate subsequently proving insolvent.³⁵ But in the case of the Bags of Linseed³⁶ it was held that if the goods are placed in the hands of the consignee with an understanding that the lien for freight is to continue, a court of admiralty will regard it as a deposit of the goods in warehouse, and not as an absolute delivery; and will regard the ship-owner as still constructively in possession sufficiently to preserve his lien. It therefore seems that, as in other cases of lien, a waiver will be presumed from an unconditional delivery.³⁶ (g)

³² *Adams v. Clark*, 9 Cush. 215.

³³ *Lewis v. McKee*, Law Rep. 2 Exch. 37. See also *Frye v. Chartered Mercantile Bank*, Law Rep. 1 C. P. 689. But a bill of lading, providing for payment of freight by the consignee on delivery, does not release the consignor. *Christy v. Row*, 1 Taunt. 311; *Collins v. Union Co.*, 10 Watts, 384. Both consignee and consignor may be liable. *Cock v. Taylor*, 18 East, 399.

³⁴ *Amos v. Temperly*, 8 M. & W. 798.

³⁵ *Sears v. Wills*, 4 Allen, 212; *Bags of Linseed*, 1 Black, 108.

(f) So he may maintain trover where the carrier assumes to retain the goods, where the goods having been sent by a route not contemplated in the contract, there is no lien. *Marsh v. Union Pacific Railway Co.*, 3 McCrary, 236. So where the carrier demands more than is due, and a formal tender is not necessary. *Long v. Mobile & Montgomery Railroad Co.*, 51 Ala. 512.

(g) *Reinman v. Railroad Co.*, 51 Iowa, 338. And it will make no difference that the goods were sent to the consignee subject to the order of another, they having been ordered by the consignee and received by him in good faith. *Lake Shore & Michigan Southern Railway Co. v. Ellsley*, 85 Penn. St. 283.

25. Delivery of part of the cargo will not operate as a waiver of the lien upon the portion not delivered.³⁶ (h) Where goods are shipped for distinct voyages, having different termini, the lien for one voyage does not extend to the other.³⁶ It is for the jury to say, whether there has been a complete delivery.³⁶

26. A contract to pay what is called dead freight for the portion of the ship not filled, creates no lien upon the goods sent, for the deficiency.³⁷ The owner of the ship chartered for the voyage has no lien for the hire of the vessel,³⁸ because he parts with the possession of it to another, who is *pro hac vice* the owner. But where the terms of the charter-party are such, that the owner, in construction of law, retains possession of the vessel, and the charterer only secures a special mode of compensation for freight, the owner's lien continues upon the freight to the extent of his interest.³⁹

27. A carrier cannot by general notice secure a lien for the general balance of account of freight, so as to bind the goods coming in the name of a factor for his balance as against the general * owner of the goods.⁴⁰ And a general usage or custom to

³⁶ *Bernall v. Pim*, 1 Gale, 17.

³⁷ *Phillips v. Rodie*, 15 East, 547. See *Small v. Moates*, 9 Bing. 574, where TINDAL, C. J., says, "An express contract is the strongest and surest ground on which the right of lien can in any case be placed."

³⁸ *Hutton v. Bragg*, 7 Taunt. 14. But an express contract for lump freight was held to secure a lien on the cargo. *Kern v. Deslandes*, 10 C. B. n. s. 205.

³⁹ *Christie v. Lewis*, 5 Moore, 211; s. c. 2 Brod. & B. 410; *Saville v. Campion*, 2 B. & Ald. 503. When part of the freight is payable in bills on time, the lien continues till the delivery of the bills. *Yates v. Mennell*, 2 Moore, 297; *Same v. Milk*, 2 Moore, 278; *Same v. Railston*, 2 Moore, 204. But not for the payment of the bills. *Gilkison v. Middleton*, 2 C. B. n. s. 134; *Tamvaco v. Simpson*, Law Rep. 1 C. P. 363.

⁴⁰ *Wright v. Snell*, 5 B. & Ald. 350.

(h) Not even as against the right of the consignor to stop *in transitu* goods not delivered. *Potts v. New York & New England Railroad Co.*, 131 Mass. 455. s. p. *Chicago & Southwestern Railroad Co. v. Northwestern Union Packet Co.*, 38 Iowa, 377. But where a purchaser from the consignee, having taken part of the goods by per-

mission of the carrier, is by the carrier forbidden to take the rest, and notified of a claim of a lien thereon for freight on all, a promise to pay freight on all will not be implied from the taking of the residue. *New York & New England Railroad Co. v. Sanders*, 134 Mass. 53.

retain all goods for a general lien, for and in the name of the persons for whom the warehouse-keepers are retained and employed, for all balances of account for all advances or expenses for payment of duties, customs, freight, and other charges for conveying, entering, bonding, and warehousing the goods, was held an unreasonable and unjust custom, and one that could not be maintained in law.⁴¹

28. Where the carrier, without demanding freight, stores the goods as his own, it has been treated as a conversion.⁴² And where he or his appointee sells the goods without authority, and the purchaser claims the goods as his own, without setting up the claim of freight, it was held, he could not insist upon any such deduction from the value of the goods. But questions of this character are affected very much by the special circumstances and the good faith of the parties.⁴³

29. The carrier's lien for freight does not attach upon the loading of the goods on board, or until the voyage is entered upon.⁴⁴ Nor does it attach where by special contract between the parties the time of payment is delayed beyond the time of the delivery of the goods.⁴⁵ And where the carrier, under such circumstances, sold the goods at auction for the freight, it was held to be a conversion.⁴⁶ And where by the terms of the contract no lien for freight exists, a court of law cannot give one.⁴⁷

30. As the delivery of the goods and the payment of freight are concurrent acts, and the carrier parts with his lien upon delivery, it is proper for him to refuse delivery, except upon the payment of freight, from day to day and time to time, as the delivery is made.⁴⁸ The *bona fide* assignee of the bill of lading, having no knowledge of any claim for freight except that named in the bill, is entitled to the delivery of the goods on the payment of the freight named therein.⁴⁹ But a railway corporation do not waive

⁴¹ Leuckhart v. Cooper, 3 Scott, 521; s. c. 3 Bing. N. C. 99.

⁴² Everett v. Saltus, 15 Wend. 474.

⁴³ Burgess v. Grove, 3 Har. & G. 225; Clemson v. Davidson, 5 Binn. 392.

⁴⁴ Chandler v. Belden, 18 Johns. 157; Gracie v. Palmer, 8 Wheat. 605; *supra*, note 18.

⁴⁵ Kirchner v. Venus, 12 Moore, 361; How v. Kirchner, 11 Moore, 21.

⁴⁶ Paynter v. James, Law Rep. 2 C. P. 348; Black v. Rose, 2 Moore P. C. n. s. 277.

⁴⁷ Pollock, C. B., in Foster v. Colby, 8 H. & N. 715.

their lien for * freight upon a cargo of coal, by placing it in bins upon their own land adjoining that of the owners, and allowing them to take from the bin, from time to time, and deliver to their customers.⁴⁸

31. Where the contract for freight is for a stipulated sum, each day, between two points, taking in and putting out freight at certain specified places, it was held, the carrier had a lien upon the goods remaining on board at the return of the boat, for all the freight earned during the day.⁴⁹

32. If the carrier claims a lien upon goods for dead freight, and also for actual freight, and to detain the goods until both are paid, this will dispense with a tender for the actual freight, when that alone is held valid; and the carrier is liable for conversion without the tender of the sum actually due, that being deducted from the amount of the damages.⁵⁰

33. There is no principle of the law better settled, than that the carrier cannot demand freight until the contract is fully performed on his part, even to the delivery of the goods at the termination of the transit, or placing them in warehouse because the consignee is not ready to receive them.⁵¹ But unquestionably, when the owner or consignee fails to pay freight when the goods are ready for delivery, the carrier is not bound to look solely to his lien for redress. He may, as in other cases of lien, insist upon his lien and detain the goods until freight is paid; and at the same time maintain an action against the proper party for the recovery of freight.⁵²

34. This may, at first sight, seem at variance with the rule laid down in a former section.⁵³ But the money required to be paid to the carrier, in order to compel him to accept the goods and to close the contract for transportation, as already shown,⁵⁴ although sometimes in a loose way called freight, is not strictly such, since

⁴⁸ *Lane v. Old Colony Railroad Co.*, 14 Gray, 149.

⁴⁹ *Fuller v. Bradley*, 25 Penn. St. 120.

⁵⁰ *Kerford v. Mondell*, 5 H. & N. 931.

⁵¹ PARSONS, C. J., in *Lane v. Penniman*, 4 Mass. 91; STORY, J., in *The Nathaniel Hooper*, 3 Sumner, 542; *Palmer v. Lorillard*, *supra*, note 4; *Tirrell v. Gage*, 4 Allen, 245.

⁵² *Supra*, pl. 30, & note 46; *Beckwith v. Sibley*, 11 Pick. 482; *Corless v. Cumming*, 6 Cow. 181.

⁵³ *Supra*, § 176, pl. 2, and notes.

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it may be recovered back, provided the carrier does not so fulfil his contract, as to be legally entitled to demand freight.⁵⁴ The money so paid in advance is to be regarded in the nature of a special deposit, to secure the freight to the carrier in order to place him upon a fair footing with reference to the undertaking; that as he is compellable to accept the service, he should not be also obliged to incur any hazard in regard to the ultimate payment of his freight. As one of the cases, already cited,⁵⁴ will show, this payment in advance to the carrier, if made by compulsion and in order to bind the bargain, is to be regarded as a mere deposit for security; but where such advance of money is made to the carrier for his own convenience merely, it is to be regarded as an advance on account, to be adjusted upon the final settlement, and the legal balance, if any, to be refunded.

. 35. There is a question which has been considerably discussed, how far the carrier is ever, and if so, when, entitled to demand freight for the performance of part of the journey. If the contract is entire, it should be so regarded, it would seem, on both sides, and the carrier be as much entitled to earn his full freight by full performance, as he is bound to full performance in order to earn any freight, and the subject seems to have been so regarded. And when the owner of the goods takes them from the carrier when he is in no default, and for the mere convenience of the owner, the carrier will reasonably be entitled to demand full freight, unless he consents to waive some portion of his full claim, which must be decided, as matter of fact. But even under these circumstances, as the carrier has not been at all the expense which full performance might require, it may not unnaturally be supposed that he would consent to accept something less than full freight. But this must depend very much upon the nature and course of transportation. It is well settled, probably, in the case of passenger transportation, that nothing will be refunded, even where the passenger never avails himself of any portion of the concession to which he is entitled under his ticket. And upon the same principle, if, after the goods are committed to the carrier for transportation, their destination is countermanded, or they are

⁵⁴ *Griggs v. Austin*, 3 Pick 20; *Brown v. Harris*, 2 Gray, 859; *Chase v. Alliance Insurance Co.*, 9 Allen, 311; *Minturn v. Warren Insurance Co.*, 2 Allen, 86; *Benner v. Equitable Insurance Co.*, 6 Allen, 222; *Watson v. Duykinuck*, 3 Johns. 335.

taken out of the custody of the carrier short of the original destination, the carrier might still insist upon his full freight. But whether he did or consented to accept a *pro rata* compensation would be, in every case, matter of fact to be determined by the jury.⁵⁵ But where the goods are so surrendered, by mutual arrangement, the just inference will be that freight shall be paid *pro rata*.⁵⁵ Mr. Justice STORY, in *The Nathaniel Hooper*,⁵⁶ thus defines the law on this point: The cases "in which the full freight is, on the ordinary principles of the commercial law, due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement, that the non-arrival has been occasioned by no default or inability of the carrier ships, but has been occasioned by the default or waiver of the merchant shipper."

36. But where the transportation is interrupted by the fault of the carrier, or by that concurring with other unavoidable incidents, and in consequence the owner of the goods interferes and accepts the goods, in order to secure their safety or to dispose of them, and thus save greater loss by further delay, there is no legal presumption from these facts merely, that the carrier is released from any liability for damages already accrued by reason of any default or failure to perform the full undertaking on his part.⁵⁶

⁵⁵ *Parsons v. Hardy*, 14 Wend. 215; *Hunt v. Haskell*, 24 Me. 339; *Rossiter v. Chester*, 1 Doug. Mich. 154; s. c. 2 Redf. Am. Railw. Cas. 207. Some of the cases seem to consider that the owner accepting the goods before the full transportation is performed is never responsible for more than *pro rata* freight. *Lorent v. Kentring*, 1 Nott & McC. 132. And this might fairly be held the just implication; pp. 181, 182. In *Caze v. Baltimore Insurance Co.*, 7 Cranch, 358, Mr. Justice STORY said in regard to freight *pro rata* being due: "The whole class of cases resting on the authority of *Luke v. Lyde*, 2 Bur. 882, proceed on the ground that there is a voluntary acceptance of the goods themselves at an intermediate port; and not a compulsive" one. And the same view is maintained in *Sampayo v. Salter*, 1 Mason, 43; *Hurtin v. Union Insurance Co.*, 1 Wash. C. C. 530.

⁵⁶ *Bowman v. Teall*, 23 Wend. 306; *Todd v. Figly*, 7 Watts, 542; *The Nathaniel Hooper*, 3 Sumner, 542. The general duty of a common carrier is to transport goods by his usual route and to deliver them in a reasonable time; and this whether on his own line or extending beyond it. *Empire Co. v. Wallace*, 68 Penn. St. 302. He must use reasonable diligence, but is not bound to extraordinary exertions or to incur extra expense to overcome obstacles caused by the act of God. Thus, where the carrier's route was by rail to Philadelphia and by water to Boston, he is not bound to send by rail from Philadelphia to Boston, when there is an obstruction in the water communication. *Ib.*

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37. If the carrier by water, whose duty ends with the delivery of the goods upon the wharf, afterwards cause them to be carried to the consignee's place of business, either by his own servants or others, but without the consent of the consignee, he can maintain no lien upon the goods for such volunteer transportation.⁵⁷

38. But where a carrier was directed to forward goods by a particular line from the end of his route, but forwarded them by another line, by which the freight was greater than if sent by the line directed, it was held that he was responsible to the consignor for the difference.⁵⁸

SECTION XXIII.

Time of Delivery.

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| 1. Carrier must deliver goods in a reasonable time, or according to his contract.
a. (a) Delay caused by the violence of a mob will not render the carrier liable.
2. Nor will delay caused by unusual press of business. | 3. Nor will delay caused by the loss of a bridge from an unusual flood.
4. Carriers excused by the custom and course of the navigation.
5. Two companies using the same line, one not liable for delay caused by negligence of the other.
6. Mode of proof in actions for injury to goods. |
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§ 189. 1. In the absence of a special contract, the carrier is bound to perform his duty; i.e. deliver the goods at their destination, or at the end of his route, to the next carrier, in a reasonable time, according to the usual course of his business, with all convenient despatch.¹ (a) And if the carrier or his servant,

⁵⁷ Richardson v. Rich, 104 Mass. 156.

⁵⁸ Proctor v. Eastern Railroad Co., 105 Mass. 512.

¹ Raphael v. Pickford, 5 Man. & G. 551; Broadwell v. Butler, 6 McLean, 296; Ward v. New York Central Railroad Co., 47 N. Y. 29. But what is reasonable time is a question of fact, depending on the circumstances. Ib. Nettles v. South Carolina Railroad Co., 7 Rich. 190; id. 409; *supra*, § 167; Conger v. Hudson River Railroad Co., 6 Duer, 375. And the carriers are not justified in adopting a particular mode of forwarding the goods and thereby delaying the delivery, merely because that is the usual mode adopted. Hales v. London & Northwestern Railroad Co., 8 Law T. n. s. 421; s. c. 4 B. & S.

(a) To carry within a reasonable time is the implied agreement. Chicago & Alton Railroad Co. v. Dawson, 79 Mo. 296. The carrier is not liable

within the scope of * his employment and duty, enter into any special contract to deliver in any particular time or place, even beyond the terminus of his particular route, it will be binding, and the owner, it would seem, may recover damages, with reference to expected profits, had the goods been delivered in time.²

66. Nor can the carrier, who contracts to transport goods on the Missouri River, by steamboat, within a reasonable time, excuse delay, on the ground of such a fall of the water as to render navigation with his own boats impracticable, provided other smaller boats continue their trips with safety. *Collier v. Swinney*, 16 Mo. 484. The delivery of the goods at the end of the transit must be in a reasonable time, place, and manner. *Hill v. Humphreys*, 5 Watts & S. 123; *Favor v. Philbrick*, 5 N. H. 358. If the fault of the defendant hinders the delivery of the cargo, the owner of the vessel is entitled to the hire, as upon a full delivery. *Bradstreet v. Baldwin*, 11 Mass. 229. A contract to carry in conformity to directions to be given at an intervening port, implies a duty to give such directions in a reasonable time after arrival at that port. *Woolley v. Reddlelien*, 5 Man. & G. 316. An embargo being laid on navigation at an intervening port, only excuses the carrier during its continuance, and he is then bound to complete the voyage, although the embargo had continued for two years. *Hadley v. Clarke*, 8 T. R. 259.

* *Wilson v. York, Newcastle, & Berwick Railway Co.*, 18 Eng. L. & Eq. 557; *Hughes v. Great Western Railway Co.*, 14 C. B. 637; s. c. 25 Eng. L. & Eq. 347. But in *Boner v. Merchants' Steamboat Co.*, 1 Jones N. C. 211, it is said that the obligation on carriers, by which they become insurers, does not extend to the time of delivery. *Parsons v. Hardy*, 14 Wend. 215; *Story Bailm.* 545 a. See also on this point, *Sangamon & Morgan Railroad Co. v. Henry*, 14 Ill. 156; *Kent v. Hudson River Railroad Co.*, 22 Barb. 278; *Lipford v. Charlotte & South Carolina Railroad Co.*, 7 Rich. 409, and *Nettles v. Same*, 7 Rich. 190; *Harmony v. Bingham*, 12 N. Y. 99; 1 Duer, 209, where it is held, that if the party enter into a contract to deliver goods within a specified time, he cannot excuse himself by showing delay caused by inevitable necessity; and this is undoubtedly the established rule of law on this subject, and in regard to all analogous subjects, where the party makes an absolute con-

for a delay occasioned by the violence of a mob during a strike. *Pittsburg, Cincinnati, & St. Louis Railway Co. v. Hollowell*, 65 Ind. 188. *Lake Shore & Michigan Southern Railway Co. v. Bennett*, 89 Ind. 457. And it will make no difference that the cause of the mob is an unjust and oppressive reduction of wages of the carrier's employes. *Pittsburg, Cincinnati, & St. Louis Railway Co. v. Hollowell*,

supra. But a mere sudden and wrongful refusal of employes to work will not excuse the carrier for delay. *Read v. St. Louis, Kansas City, & Northern Railroad Co.*, 60 Mo. 199. And the company must use due diligence to overcome such obstacles as mobs, &c. *Greismer v. Lake Shore & Michigan Southern Railroad Co.*, 26 Am. & Eng. Railw. Cas. 287.

And the acceptance of goods by the consignee at a place short of their destination will not excuse the carrier from responsibility for damages incurred by breach of his contract of affreightment.³ Nor will the acceptance of a part * afford any excuse for not delivering the residue.⁴ And where the consignee refuses to accept the goods, it is the duty of the carrier to take such course as he deems most for the interest of the owner, having also proper regard to the security of his own charges; and if he adopts such a course as men of common prudence would, he is not responsible for consequences.⁵ The consignee may at any time dispense with the mode of delivery adopted by the consignor, and the contract between the consignor and the carrier, as implied by law, without any special stipulations, will be to deliver to the consignee at his place of business, unless he shall otherwise order.⁶ And if the carrier, instead of delivering to the consignee, keep wheat at the station, and it is injured by remaining so long in the bag, the carrier will not be responsible to the consignor for the loss.⁶

tract, not providing for any contingency or excuse. Angell Carriers, § 294. See *Nudd v. Wells*, 11 Wis. 407; *supra*, § 175, in note 2, § 187, pl. 4, note 7. But in *Bridgman v. The Emily*, 18 Iowa, 509, where the defendants refused to perform their contract to carry goods from Council Bluffs to St. Louis, and gave no excuse for the refusal, or any proof that plaintiffs might readily have obtained transportation otherwise, the defendants were held responsible for the difference in the price of the goods at the two points, at the time they should have arrived, deducting the agreed price of carriage. And in general, the proper measure of damages in an action for not delivering goods at the place of destination according to the contract or legal duty of the carrier, is the difference in the value at the place of receipt and the value at the place of delivery. *Bracket v. McNain*, 14 Johns. 170; *Amory v. McGregor*, 15 Johns. 24; *O'Connor v. Forster*, 10 Watts, 418. See *Wallace v. Railway Co.*, 17 W. R. 464; *Deming v. Railroad Co.*, 48 N. H. 455.

³ *Atkisson v. The Castle Garden*, 28 Mo. 124.

⁴ *Cox v. Peterson*, 30 Ala. 608.

⁵ *The Keystone v. Moies*, 28 Mo. 243.

⁶ *London & Northwestern Railway Co. v. Bartlett*, 7 H. & N. 400; s. c. 5 L. T. N. S. 399. This was a case where wheat was sold to be delivered at the consignee's mill, and forwarded accordingly, and, on its arriving at the station two miles from the mill, it was kept there, in consequence of instructions by the consignee that wheat arriving for him should not be forwarded without his written order. And the consignee having examined the wheat at the station, refused to accept it, and while it remained there it became deteriorated in quality and value. It was held that the consignor had no right of

2. But, if the carriers, being a railway company, make no special contract to deliver in any particular time, and a delay happen in the transportation, in consequence of an unusual press in business, the company having a reasonable equipment for all ordinary purposes, and the goods being carried with as much expedition as is practicable under the circumstances, they are not liable for damages.⁷

* 3. But where the delay in transportation happened in consequence of the loss of one of the company's bridges, by an unusual freshet, and in the mean time the price of the goods depreciated in the market, it was held that the company were not liable, this being the act of God. It was held, that for any injury to the goods during the delay, the company are liable.⁸

4. But the falling of the water in the Ohio River, preventing a boat passing up the falls with its cargo, was held not to come strictly within the exception to the carriers' responsibility. But proof of a long-established usage, uniform and well known, to allow boats, in such cases, to wait a month or more for the rise of water, without incurring liability for not delivering their

action against the carrier for not delivering the wheat at the mill, as the non-delivery was by order of the consignee, s. c. 8 Jur. n. s. 58. See also *Baker v. The Milwaukee*, 14 Iowa, 214. The question of property as between consignor and consignee depends on the contract of the parties and not on any inflexible rule of law.

⁷ *Wibert v. New York & Erie Railway Co.*, 19 Barb. 36; s. c. 12 N. Y. 245; *Ward v. New York Central Railroad Co.*, 47 N. Y. 29-33. And especially where the bill of lading excuses the carrier from responsibility for loss caused by accidental delay, and it is caused by necessary repairs on a steamer. *Lawrence v. New York, Providence, & Boston Railroad Co.*, 36 Conn. 63. In this case it is said that the measure of damages in such cases is not necessarily the difference in price at the time it should have been delivered and that at which it was delivered. *Galena & Chicago Railroad Co. v. Rae*, 18 Ill. 488. But it is further said in this case, that taking grain from wagons, in preference to taking it from private warehouses, is no unjust discrimination. But if the company's servants unjustly give preference to one party over others, in regard to transportation, the company will be liable for all damage; and it must receive freight according to its usual custom, even when that is effected by means of running cars on a side track and taking wheat from a private warehouse. Or if the carrier neglect to take proper care of the goods during the delay he will be responsible for damage accruing in consequence. *Peck v. Weeks*, 34 Conn. 145.

⁸ *Lipford v. Charlotte Railroad Co.*, 7 Rich. 409. But see *supra*, § 188, note 3. See also *The May Queen*, Newb. 464.

cargo in a reasonable time, under the usual bill of lading, with "the privilege of reshipment," is admissible. And it was held, that such delay did not deprive the owner of the right to recover full freight.⁹ But a carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts, or incur extra expense, in order to surmount obstructions caused by the act of God, as a fall of snow.¹⁰ It is said, in an English case,¹¹ that in the absence of special agreement there is no implied contract on the part of a railway company to deliver with punctuality, but the contract is rather to carry safely and deliver within a reasonable time.

5. Where one company, by agreement under a general act of parliament, confirmed by special act, had running powers over another company's line, and the traffic on the line was delayed by a collision caused by the negligence of the servants of the accessory line, it was held that the company owning the line were not chargeable with any default, by reason of the delay, in the delivery of goods caused by such collision.¹¹

6. In an action against a carrier for damage done to goods carried, it is enough to prove the good condition of the articles when * put into his possession and their deteriorated state when received from him. And any damage resulting from bad package will go to lessen the amount of the recovery.¹² (b)

⁹ *Broadwell v. Butler*, 6 McLean, 296.

¹⁰ *Briddon v. Great Northern Railway Co.*, 28 Law J. 51; 32 Law T. 94.

¹¹ *Great Northern Railway Co. v. Taylor*, Law Rep. 1 C. P. 385; s. c. 12 Jur. N. S. 372.

¹² *Higginbotham v. Great Northern Railway Co.*, 2 Fost. & F. 796. In an action against a carrier for injury to casks of oil, alleged by the carrier to have arisen from defects in the casks, it was left to the jury whether it arose from such defects, and whether, if it did, the carrier knew or ought to have known of it, and acted negligently in sending them on in that state. *Cox v. London & Northwestern Railway Co.*, 3 Fost. & F. 77.

(b) An action for failure to deliver is properly brought in the name of the consignee alone, although the suit is for the use of another. *Mobile & Girard Railroad Co. v. Williams*, 54 Ala. 168. And so the consignor may sue, where the carrier sustains no relation to the consignee other than such as results from possession of the goods; and he may recover the full value, though the goods are the property of the consignee, if the consignee has not sued. *Finn v. Western Railroad Co.*, 112 Mass. 524. See *Pennsylvania Railroad Co. v. Holderman*, 1 Am. & Eng. Railw. Cas. 285.

SECTION XXIV.

Carriers have an Insurable Interest in the Goods.

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| 1. Carriers may insure for their own benefit.
2. So may warehousemen or wharfingers, and they may recover the full value of the goods, in trust.
3. Carriers may insure in trust, and re- | cover the full value, though not liable for loss by fire.
4. Consignee in a bill of lading may be shown to have no insurable interest.
5. Running insurance, on time, apportioned. |
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§ 190. 1. As carriers become insurers of all goods which they carry against fire or marine disaster, except from inevitable accident, there can be no doubt they have, to that extent, an insurable interest in the goods, and it has been so held.¹(a) And this insurable interest continues, so long as the liability of the carrier continues, even where they employ other carriers.¹

2. And a warehouseman or wharfinger with whom goods are deposited has an insurable interest in such goods, although there has been no previous authority given by the general owners to insure, nor any notice given to them of the insurance. Such goods are properly described in a policy as goods "in trust." The insured in such case are entitled to recover the full value of the goods destroyed by fire, but are accountable to the general owners for the excess of the amount so received above their own * interest in the goods, which in this case extended only to the charges of warehousing.²

¹ Chase v. Washington Mutual Insurance Co., 12 Barb. 595. But the carrier has the right, by express contract, to except risks from fire or any other cause, from his undertaking, and in such case he is not liable for loss by the excepted risk. Parsons v. Monteath, 13 Barb. 353. But on general principles the first carrier is liable for loss by fire, while the goods are in a float, changing to the next carrier. Miller v. Steam Navigation Co., 13 Barb. 361.

² Waters v. Monarch Life & Fire Insurance Co., 5 Ellis & B. 870; s. c. 34 Eng. L. & Eq. 116. "The carrier being responsible for the safe custody and

(a) A policy excepting fire "arising from petroleum" will not cover property in a car burned in a collision of the train with another train composed mainly of oil cars loaded with petroleum, the petroleum taking fire immediately upon the happening of the collision. Insurance Co. v. Express Co., 95 U. S. 227.

3. And common carriers may insure goods in their possession, as carriers, describing them as "goods in trust as carriers," and such an insurance will cover the whole value of the goods, and if the goods are destroyed by fire the carrier will be entitled to recover of the insurer their full value, and it will make no difference that under the statute, or by special contract, the carriers were not responsible for losses by fire.³

4. But the fact that one is named as consignee in a bill of lading is not conclusive proof that he has in his own right an insurable interest. It may still be shown that he was a mere agent.⁴ But unquestionably a factor or broker to whom goods are consigned by the bill of lading may insure in his own name for whom it may concern, and thus recover to the full extent of any insurable interest which he fairly represented.

5. Where a carrier upon a canal effected an insurance for twelve months, for £10,000, upon goods on board thirty boats named between London, Birmingham, &c., backwards and forwards, with leave to take in and discharge goods at all places on the line of navigation, it was held that the policy was not exhausted, when once goods to the value of £10,000 had been carried on all the boats, or by each of them, but that it continued throughout the year, to protect all the goods afloat, at any one time, up to the amount insured, and that upon the loss of goods on board any one of the boats the assured was entitled to recover the proportion of the loss that £10,000 bore to the whole amount of the goods carried during the year.⁵

due transportation of the goods, may recover the full value of the goods and hold the same in trust for the owner." CLIFFORD, J., in *The Commerce*, 1 Black, 574. And in cases of insurance for the benefit of carriers, it is a sufficient allegation of interest in the subject-matter that the insurance was for the benefit of the plaintiff, as carrier, without alleging that he had paid the owner of the goods their value, or for his interest therein. *Van Natta v. Security Insurance Co.*, 2 Sandf. 490. The shipper, too, named in a bill of lading, may recover of the carrier for any injury to the goods, although he has no property, general or special, in the goods. *Blanchard v. Page*, 8 Gray, 281.

³ *London & Northwestern Railway Co. v. Glyn*, 1 Ellis & E., 652.

⁴ *Seagrave v. Union Marine Insurance Co.*, Law Rep. 1 C. P. 305.

⁵ *Crowley v. Cohen*, 3 B. & Ad. 478.

*SECTION XXV.

Actions against Carriers.—Rule of Damages and other Incidents.

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| <ol style="list-style-type: none"> 1. Damages for total loss, the value of the goods at the place of destination. 2. Goods merely damaged, owner bound to receive, with money compensation for the loss. 3. On evidence of unfaithfulness or negligence of carrier's servant, explanation must be given, or the carrier held liable. 4. Carrier liable for special damages, where he acts <i>mala fide</i>. 5. But in general only for the value of the goods. 6. Consignor owning the goods the proper party to sue. | <ol style="list-style-type: none"> 7. Consignor suing for injury to the goods not estopped by a receipt from consignee acknowledging good order. 8. Actions may be brought in the name of bailee or agent, rightful custodian of the goods. 9. Recovery in such case bars the claim of general owner. 10. Where general property is in consignee, he should sue. 11. Preponderating evidence must be given by the plaintiff. 12. Deviation by the carrier from the regular route, when a conversion. |
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§ 191. 1. The general rule of damages, in actions against carriers, where the goods are lost or destroyed by any casualty within the range of the carrier's responsibility, is sufficiently obvious. It must be the value of the goods at the place of destination.¹ (a) And this will commonly include the profits of the

¹ *Hand v. Baynes*, 4 Whart. 204; *Grieff v. Switzer*, 11 La. An. 324. See also *Taylor v. Collier*, 26 Ga. 122; *Dean v. Vaccaro*, 2 Head, 488; *Davis v. New York & Erie Railway Co.*, 1 Hilton, 543; *Michigan Southern & Northern Indiana Railroad Co. v. Carter*, 13 Ind. 164. See *Harris v. Panama Railroad Co.*, 3 Bosw. 7, where it is held, that in an action against a carrier to recover the value of property destroyed through his negligence, during its transit, at a place where such property has not been the subject of traffic, or has not been bought and sold, the measure of his liability is the fair value of the property at or near the place of its destruction. But, in determining such

(a) *Chicago & Northwestern Railway Co. v. Dickinson*, 74 Ill. 249. And this includes interest, whether from date of the loss or from the date when the goods should have been received. See *Erie Railway Co. v. Lockwood*, 28 Ohio St. 358; *Robinson v. Merchants' Despatch Co.*, 45 Iowa, 570. But the general rule that the value to be put on goods lost is the value at the place of destination is more especially applicable to goods shipped for sale there, and not to household goods and wearing apparel in use. *Denver South Park & Pacific Railroad Co. v. Frame*, 6 Col. 382. The measure of damages in case of the loss of goods of the latter sort is the value to the owner. *International & Great Northern Railway Co. v. Nicholson*, 61 Tex. 550.

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adventure.² In a well-considered English case,³ Lord TENTERDEN, C. J., thus lays * down the rule: "The damages ought to be the value of the cargo, at the time when it ought to have been delivered, that is, at the port of discharge." PARKE, J., said, "The sum it would have fetched, at that time, is the amount of loss sustained by the non-performance of the defendants' contract." But in another case,⁴ where the goods were destroyed at the port of shipment, and before the voyage was entered upon, without the fault of the carrier, it was held he was only responsible for the value of the goods at that port, and no interest should be added even after suit brought.

2. But where the goods are only damaged, the owner is still bound to receive them, and cannot abandon, and go against the carrier as for total loss.⁵ But whether the owner have accepted

value, it would seem that the jury may take into consideration the fact that the property has a market value, at a place other than that where it was destroyed, and to which it was destined, and towards which the carrier, in the course of the usual and regular communication with such place, was then taking it, in connection with the hazards and expenses attendant upon the rest of the intended voyage. See also *Spring v. Haskell*, 4 Allen, 112.

² Sedgw. Dam. 356.

³ *Brandt v. Bowlby*, 2 B. & Ad. 932. See also, *Gillingham v. Dempsey*, 12 S. & R. 183; *Ringgold v. Haven*, 1 Cal. 108. Trover will not lie against the carrier, or any other bailee, for mere neglect of duty. There must be an actual conversion, or a refusal to deliver on proper request. *Bowlin v. Nye*, 10 Cush. 416; Opinion of court in *Rome Railroad Co. v. Sullivan*, 14 Ga. 283; *Robinson v. Austin*, 2 Gray, 564.

⁴ *Lakeman v. Grinnell*, 5 Bosw. 625. And where the carrier is guilty of unreasonable delay in the transportation, the decline of the price of the goods, in the mean time, is proper to be considered in estimating damages. *Weston v. Grand Trunk Railroad Co.*, 54 Me. 376; *Sisson v. Cleveland & Toledo Railroad Co.*, 14 Mich. 489; *Henderson v. The Maid of Orleans*, 12 La. An. 352. But where goods were sent by railway to plaintiffs' traveller, at C., and failed to arrive before he left, through the fault of the company, it was held that the profits of any expected sale at C. could not be included in the damages. *Great Western Railway Co. v. Redmayne*, Law Rep. 1 C. P. 329. And in *Woodger v. Great Western Railway Co.*, Law Rep. 2 C. P. 318, the same court held that where a parcel failed to reach the owner in time by reason of the negligence of the carrier, and he was delayed on expense in consequence, he could not recover his hotel expenses by way of damages, not having informed the carrier of the contents of the parcel or the purpose of sending it. This was the case of parcels sent forward by a commercial traveller, detained on the way three days through the neglect of the carrier.

⁵ *Shaw v. South Carolina Railroad Co.*, 5 Rich. 462. Even where a cask

the goods, or not, he may recover for any deterioration they have sustained, unless by the excepted risks in the carrier's undertaking.⁶

3. In an action against a carrier, slight evidence having been given that the porter of the carrier stole the goods, and the jury having found for the plaintiff, a new trial was denied, on the *ground that the carrier did not offer the porter as a witness.⁷

of brandy was injured in the passage by the fault of the carrier and one gallon out of ten leaked out, whereby the consignee refused to accept it, it was held the consignor could only recover for the one gallon and the cask, the remainder being uninjured. *Howe v. Oswego & Syracuse Railroad Co.*, 56 Barb. 122; *supra*, § 186, note 2. So also, where the goods are not delivered in a reasonable time, the owner can only recover damage of the carrier. *Scoville v. Griffith*, 12 N. Y. 509; *Hackett v. Boston, Concord, & Montreal Railroad Co.*, 35 N. H. 390. Where part only of the goods are injured, the carrier is liable only for that part, nor is his liability enhanced by failure to offer to deliver the uninjured part. *Michigan Southern & Northern Indiana Railroad Co. v. Bivens*, 13 Ind. 263. Where a portion of goods shipped by one entire contract of affreightment is lost by fault of the carrier, and the residue is sold by him by the bill of lading at the port of delivery, he not knowing such loss, the carrier, if sued by the consignee for money had and received from the proceeds of the sale, cannot deduct the freight, but may deduct a discount allowed by him to the purchaser on discovering the deficiency in the goods. *Stevens v. Sayward*, 8 Gray, 215.

⁶ *Bowman v. Teall*, 23 Wend. 306.

⁷ *Boyce v. Chapman*, 2 Bing. N. C. 222. And on general principles the plaintiff makes a *prima facie* case, by showing that the goods did not reach their destination. *Story Bailm.* § 529 *a*; *Woodbury v. Frink*, 14 Ill. 279; *Bennett v. Filyaw*, 1 Fla. 403; *The Oregon*, Newb. 504; *The May Queen*, Newb. 464. But where the carrier has, by notice or special contract, limited his responsibility as a common carrier, the burden of showing negligence is on the consignee, the same as in ordinary suits charging neglect of duty. *Ib.* But where the bill of lading states the goods to have been shipped in good order, and they arrive in a damaged state, the burden of proof is on the carrier, to show that the damage occurred by causes for which by the bill of lading he was not responsible. *The Cleveland*, Newb. 221. And where in such case the carrier shows the existence of facts from which this could be fairly inferred, it devolves upon the shipper to show that the damage might have been prevented by the exercise of ordinary care and skill on the part of the carrier. *Ib.*

And where the carrier at first wrongfully refused to deliver goods consigned to a manufacturer, but afterwards delivered them, it was held that he was not liable for consequential damages, from the delay of the consignee's works, or the consequent loss of profits, but only for the expense of sending a second time for the goods. *Waite v. Gilbert*, 10 Cush. 177. Perhaps the manufact-

And in an action against a railway for negligence, if the plaintiff show * damage resulting from an act of defendants, he makes a

urer was entitled to some consideration, by way of damages, until he could have supplied himself in other ways, with similar materials, if indispensable for his present use. But to recover such special damages, which are not the natural or ordinary result of the act complained of, it is probably necessary in strictness, to declare specially. But in one case in the Court of Exchequer, for not carrying a passenger according to the carrier's duty and contract, it was held that no such remote and accidental damages are recoverable, in any form. *Hamlin v. Great Northern Railway Co.*, 1 H. & N. 408; s. c. 38 Eng. L. & Eq. 335. See *infra*, § 199, note 2. But in a recent English case, *Mullett v. Mason*, Law Rep. 1 C. P. 559; s. c. 12 Jur. n. s. 321, where the plaintiff bought of the defendant a cow, on the assurance of the latter that he would warrant her, and that she had come off his father's farm, and it proved to be a foreign cow, and in a few days died of the cattle plague, and thereby caused the death of other cows belonging to plaintiff, it was held that he might recover the value of other cows so lost. And in another case in admiralty, *Dr. LUSHINGTON* allowed the master his expenses in defending himself in a foreign port against a charge of murder brought against him by two of the crew whom he had justly chastised on the voyage, and for £10 paid as the penalty of the recognizance required of him on his acquittal to prosecute the men for perjury, but which he elected to forfeit in order to continue his voyage. The allowance was made on the ground that the master was entitled to the expenses of his defence, as the charge originated directly from the performance by the master of his duty to the owners in chastising the men; and also that it was for the interest of the owners that the master should forfeit his recognizances, and not be delayed in returning with the vessel. *The James Seddon*, Law Rep. 1 Adm. & Ecc. 62; s. c. 12 Jur. n. s. 609. But in the case of *Gee v. Lancashire & Yorkshire Railway Co.*, 8 Law T. n. s. 238; s. c. 6 H. & N. 211, where an action was brought against a carrier for delay in delivering goods, when there was no special contract, and the judge directed the jury to find a certain sum for the wages of the plaintiff's servants, who were kept out of employment by the non-arrival of the goods; and also left it to the jury to name the amount the plaintiff should recover for the loss of profits for the same cause, it was held to be a misdirection, on the authority of *Hadley v. Baxendale*, 9 Exch. 341. The cases are somewhat numerous in the English courts, where the carrier, who acts in good faith and fails to deliver goods in such time as he might have done with proper diligence, and therefore ought to have done, is held not liable for loss of expected profits, but only for the particular loss on the article thus failing to be delivered in proper time. *Wilson v. Lancashire & Yorkshire Railway Co.*, 9 C. B. n. s. 632; s. c. 7 Jur. n. s. 862; *Collard v. Southeastern Railway Co.*, 7 H. & N. 79; s. c. 7 Jur. n. s. 950; *Simmons v. Southeastern Railway Co.*, 7 H. & N. 1002; s. c. 7 Jur. n. s. 849; *Rice v. Baxendale*, 7 H. & N. 96. If there be no market at the place of delivery the jury may give the cost of the articles, and reasonable expenses and profits. *O'Hanlan v. Great Western Railway Co.*, 6 B. & S. 484.

prima facie case, and the defendants must show that he was in the exercise of the requisite degree of care, or else that such a state of circumstances existed as rendered all exercise of care unavailing; and this is so although the act complained of is one which, with proper care, does not ordinarily produce damage.⁸

4. In an English case⁹ it is held, that if a railway company omit to deliver bundles of packed parcels in time, with a view to injure the plaintiff's business as a collector of parcels, and thereby create a monopoly in themselves, they will be liable for the special damage resulting therefrom, but not otherwise.

5. Where a plan and models sent to compete for a prize were lost by the carriers, it was held, the proper measure of damages is the value of the labor and materials expended in making the articles, and not damages from losing the chance of obtaining the prize; the latter being too remote.¹⁰

* 6. The consignor, who owns the goods and sustains the injury from the damage or loss, is the proper party to bring the action against the carrier.¹¹ (b) In an action against the carrier for the

See also, *Tardos v. Ship Toulon*, 14 La. An. 429. And the owner of baggage lost by a railway company, while he was a passenger, can recover only the value of the things lost, and nothing for expenditure consequent upon the loss. *New Orleans Railroad Co. v. Moore*, 40 Miss. 39; *Cincinnati & Chicago Air Line Railroad Co. v. Marcus*, 38 Ill. 219.

⁸ *Ellis v. Portsmouth & Raleigh Railroad Co.*, 2 Ire. 138.

⁹ *Crouch v. Great Northern Railway Co.*, 11 Exch. 742.

¹⁰ *East Anglian Railway Co. v. Lythgoe*, 10 C. B. 726. But where the owner of the goods sustains special damage, by reason of the goods being rendered unfit for the particular use for which they were procured, the jury may consider how much they are lessened in value thereby, and give damages accordingly. *Hackett v. Boston, Concord, & Montreal Railroad Co.*, 35 N. H. 390. And where machinery was sent to Vancouver's Island to erect a mill, and on the delivery one of the cases was missing, and its place had to be supplied by sending to England, it was held, that only the value of the missing machinery, with the expense of procuring it, could be recovered, and nothing for loss by reason of the mill not going sooner into operation. *British Columbia Saw-mill Co. v. Nettleship*, Law Rep. 3 C. P. 499; *supra*, § 176, note 15.

¹¹ *Sanford v. Housatonic Railroad Co.*, 11 Cush. 155; *Coats v. Chapin*, 2 Q. B. 483; *Freeman v. Bird*, 2 Q. B. 491, note; *Sargent v. Morris*, 3 B. & Ald. 277. But the consignee is *prima facie* the owner of the goods, and in the absence of proof to the contrary, will be so regarded. *Arbuckle v. Thompson*, 37 Penn. St. 170; *Potter v. Sawing*, 1 Johns. 215; *The Merri-*

(b) See *supra* § 189, note (b).

loss of the plaintiff's goods, it is no answer that the goods were delivered to the defendant by one who, as consignor, claimed compensation for the loss, and that the defendant paid him as such consignor, without notice that he was not the owner of the goods.¹² The decision here seems to go upon the ground that there was nothing in the case to indicate that the consignor was the owner of the goods; or that he was allowed to represent the plaintiff in any such way as naturally to mislead the defendants. It is unquestionably the duty of the carrier to see that he delivers goods to the party entitled, and if he do not, although he be misled by a gross fraud, or even by a forged order, he is not excused, but is liable in trover.¹³ And by parity of reason, if the goods are lost the carrier should, before he pays any one, ascertain whether the property of the goods was in him; otherwise he would pay in his own wrong, if it should turn out the property was in another, since the contract, by construction, is with the party entitled to claim the goods. * And whether it be the consignor or consignee will depend upon circumstances readily learned upon inquiry.¹⁴ A warehouseman is regarded in the light of a middle-man, and may even dispute the title of the party delivering goods to him, and in defence of an action of trover show that the title is in some third party, who has forbidden the goods being delivered to the bailor.¹⁵ This may be at variance with some of the old cases,

mack, 8 Cranch, 317. On an assignment for the benefit of another, the assent of the latter will be presumed. *Grove v. Brien*, 8 How. 429; *Ashmead v. Borie*, 10 Penn. St. 254. And it is here said that the consignee may accept the goods at an intermediate port or place. And as a general rule the delivery of goods by the vendor to the carrier, on behalf of the vendee, is a delivery, in law, to the vendee; and he alone can maintain an action against the carrier for non-delivery. *Dutton v. Solomonson*, 3 B. & P. 582; *Jacobs v. Nelson*, 3 Taunt. 423. The action must, as a general rule, be in the name of the owner of the goods. *Law v. Hatcher*, 4 Blackf. 364. But see *Goodwyn v. Douglas*, Cheves, 174.

¹² *Coombs v. Bristol & Exeter Railroad Co.*, 3 H. & N. 1.

¹³ *Ostrander v. Brown*, 15 Johns. 39; *Hawkins v. Hoffman*, 6 Hill, 588; *Powell v. Myers*, 26 Wend. 591, *BRONSON, J.*; s. c. 2 Redf. Am. Railw. Cas., 133; *Clark v. Spence*, 10 Watts, 337, *ROGERS, J.*

¹⁴ *Watson, B.*, in *Coombs v. Bristol & Exeter Railroad Co.*, 3 H. & N. 1.

¹⁵ *Thorne v. Tilbury*, 3 H. & N. 534. See cases cited in the argument of this case. Where the owner of the goods induces the carrier to carry them for a less price by representing them of inferior value, he can only recover the amount he represented their value to be, in case of loss or damage. *McCance*

and with much which may be found in the elementary books ; but it is consistent with reason and justice, and will not be found embarrassing in practice, — with one qualification, that the bailee of goods will be permitted to set up the *jus tertii* in his own defence, when he is so situated as to be made responsible to such party in case of a recovery by the present claimant, unless he do so urge the claim of such other party in his own defence. Such a state of the case will occur always where the third party has demanded the thing of the bailee and forbid his delivering it to the bailor ; and also where the bailment is so made as to create a trust in behalf of the real owner, or party justly entitled to demand possession.¹⁵

7. A receipt for the goods by the consignee, acknowledging to have received them in good order, and in which he is requested to notice any errors therein in twenty-four hours, or the carrier will consider himself discharged, does not estop the consignor from suing the carrier for damage of the goods, although no notice thereof was given the carrier.¹¹

8. Actions against carriers may be brought in the name of bailees, or agents, who have the rightful custody of the goods, and who make the bailment, or in the name of the owner.¹⁶

* 9. But it is well settled that a recovery for the goods, of the first or any subsequent carrier, in the name of any one having

v. London & Northwestern Railway Co., 7 H. & N. 477; 7 Jur. n. s. 1304; s. c., affirmed in Exchequer Chamber, 10 Jur. n. s. 1058; 3 H. & C. 343. See also *Robinson v. London & Southwestern Railway Co.*, 19 C. B. n. s. 51; s. c. 11 Jur. n. s. 390.

¹⁵ *Elkins v. Boston & Maine Railroad Co.*, 19 N. H. 337; *White v. Bascom*, 28 Vt. 268. See *Wing v. New York & Erie Railway Co.*, 1 Hilton, 235. *Semble*, where a contract is made with a railway company to carry goods to a given point, and while *in transitu* the goods are reshipped by that company on another road, the latter company will be liable directly to the owner for a loss of the goods through their neglect. *Illinois Central Railroad Co. v. Cowles*, 32 Ill. 116.

The English courts have recently adopted rules of construction in regard to actions against carriers which seem to restrict the action to the party with whom the contract is made. *Becher v. Great Eastern Railway Co.*, Law Rep. 5 Q. B. 241. Thus where the master gave his portmanteau in charge of his servant, who procured a ticket and gave the portmanteau together with his own luggage to the proper servants of the railway, without informing them that a portion of it belonged to the master, who went by a later train without any luggage; the portmanteau having been lost, it was held, the master could not maintain the action. But see *Root v. Great Western Railroad Co.*, 45 N. Y. 524; *supra*, § 180, note 5.

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either a general or special property in the goods, in an action properly instituted, will be a bar to any subsequent suit against the same person, at the suit of another party, having either a general or special property in the goods.¹⁷

10. Where the general property in the goods vests in the consignee, upon delivery to the carrier the consignor has ordinarily no property remaining, even where he pays the freight.¹⁸ (c)

11. In the trial of actions against carriers, where the goods or baggage pass over successive lines of transportation, it has been held insufficient evidence to charge the first carrier to show the delivery of the goods to him, and the failure of their arrival at the place of destination, thus leaving the case without any preponderating evidence to show that they were not delivered to the second carrier.¹⁹

12. It has been held, that if the carrier deviate from the regular route, and the goods are lost, it is a conversion.²⁰ This may be sound law, provided there is no just occasion to depart from the ordinary route, and the deviation consequently shows a wanton abuse of the bailment; but otherwise it could only render the carrier responsible for any damage which should accrue. And where goods coming from a foreign country and which are dutiable are consigned to an agent for the mere purpose of securing the payment of the duties, the carrier, having knowledge of the limited

¹⁷ *White v. Bascom*, 28 Vt. 268; *Green v. Clark*, 18 Barb. 57; s. c. 12 N. Y. 343.

¹⁸ *Green v. Clark*, *supra*. And where a box containing jewelry was delivered to a carrier by a servant under instructions from both plaintiffs, the box being the property of one of them, and the jewelry being their joint property, but addressed to one of them only at a specified place, it was held that there was evidence of a joint bailment by both plaintiffs. *Metcalf v. London, Brighton, & South Coast Railway Co.*, 4 C. B. N. S. 307, 317; 31 Law T. 166.

¹⁹ *Midland Railway Co. v. Bromley*, 17 C. B. 372; s. c. 33 Eng. L. & Eq. 235. In general the carrier is liable on proof of loss or deficiency in the goods on arrival at their destination unless he gives exculpatory evidence. *Hawkes v. Smith*, 1 Car. & M. 72. But it must clearly appear that the missing goods were actually contained in the trunk or package when delivered to the carrier. *McQuesten v. Sanford*, 40 Me. 117.

²⁰ *Phillips v. Brigham*, 26 Ga. 617.

(c) See *supra*, § 189, note (b).

character of the agency, will not be justified in changing the destination of the goods upon the direction of such person, and if he do so is guilty of a conversion.²¹

* SECTION XXVI.

Demurrage.

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| 1. What constitutes demurrage. | 3. Carrier has no lien on cargo for any claim in the nature of demurrage. |
| 2. Damages in the nature of demurrage. | |

§ 191 *a.* 1. Demurrage is a claim by way of compensation for the detention of property which is subsequently restored. As where a ship and cargo were detained by an illegal seizure, and discharged without ultimately obtaining a certificate of probable cause, the owner was held entitled to damages by way of demurrage for the detention of the ship, and interest upon the value of the cargo.¹ So also, where by the established regulations of a railway, demurrage was charged on sacks furnished for transportation of grain, after the expiration of fourteen days; but by another of the regulations of the company none of the company's sacks containing grain were allowed to leave any station after having reached their destination, unless a guaranty is first obtained from the consignee that the sacks shall be returned.

2. Although demurrage, strictly speaking, is only due when expressly stipulated for in the contract for affreightment, yet where the vessel is detained an unreasonable time in unloading, the owner may recover damages, in the nature of demurrage, for such detention. But in such action the owner or charterer of the ship would only recover compensation for the time the vessel was unreasonably delayed, and not for consequential damages by reason of such delay.² (*a*)

²¹ *Claffin v. Boston & Lowell Railroad Co.*, 7 Allen, 351.

¹ *The Apollon*, 9 Wheat. 362.

² *Clendaniel v. Tuckerman*, 17 Barb. 184.

(*a*) As to when demurrage is allowable, see *Finney v. Grand Trunk Railway Co.*, 14 Fed. Rep. 171; *New York Central & Hudson River Railroad Co. v. New York, New Haven, & Hartford Railroad Co.*, 46 Conn. 264. And see s. c. 2 Hun, 109.

277. In computing demurrage at so

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3. A railway has no lien for the compensation impliedly due them for the detention of their cars an unreasonable time, in discharging the cargo, the cars remaining during the time in a public highway.³

* SECTION XXVII.

Common Carriers of Freight or Passengers by Water.—Rights and Duties.

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| <ol style="list-style-type: none"> 1. Covenants in a charter-party construed as independent and not as conditions precedent, where that can fairly be done. 2. Freight stipulated to be carried for so much a cubic foot is to be estimated at the time of shipment. 3. Owner of vessel responsible to freighters so long as he continues actually in possession, either by himself or by the master and seamen. 4. Delivery of goods and payment of freight concurrent acts. Carrier not bound to deliver until the consignee is ready and willing to pay. 5. Freight <i>pro rata itineris</i>. How far common carriers of goods or passengers may recover. 6. Shipper, whether owner of goods or not, is primarily liable for freight, and the carrier need not refuse to deliver until freight is paid, unless he so stipulates. | <ol style="list-style-type: none"> 7. If the carrier deliver the goods to the consignee without exacting freight, trusting to the consignor, he cannot afterwards assert claim on the bankruptcy of the consignor. 8. Carriers of passengers by water liable how far to actions for not furnishing satisfactory subsistence. 9. Captain in such cases cannot exclude a passenger from the saloon table, unless he is disorderly. 10. Carriers responsible how far for goods damaged or lost by being stowed on deck. 11. Carrier bound to know or learn the laws and regulations of the port of destination, and conform thereto. 12. Passenger carriers by water, when excused for refusing to carry obnoxious persons to places where their presence might excite riot; or in returning them to place of departure, from considerations of humanity, etc. |
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The responsibilities and duties of common carriers by water¹ do not differ essentially from those attaching to the same class of persons, in other modes of transportation, except as the modes of receiving and discharging freight, necessarily, or according to convenient usages, modify them. And it will be the purpose of the present section to point out these modifications, and some very few peculiarities attaching to passenger transportation by water.

³ *Crommelin v. New York & Harlem Railroad Co.*, 10 Bosw. 77.

¹ *Elliott v. Rossell*, 10 Johns. 1; s. c. 2 Redf. Am. Railw. Cas. 25.

§ 191 *b.* 1. In charter-parties, as well as in other contracts, covenants will be construed as independent and not as conditions precedent, if that can fairly be done, as in the case of a stipulation to proceed to a certain place and there take in a cargo, and the ship deviated slightly, and this operated to the disadvantage of the *freighter. But it was held not to avoid the contract, and that the freighters were bound to furnish the cargo,² and liable to an action for refusing to do so.

2. A contract to carry a cargo at the rate of "\$7.55 per ton of 50 cubic feet delivered, the freight to be paid on right delivery of the cargo," is to be construed as applying to the freight at the time of delivery. And if, being cotton, and subject to high hydraulic pressure, according to the usual practice, it should considerably expand before arriving at its point of destination, that will not entitle the carrier to any additional compensation.³

3. Where a ship under a charter-party, is advertised as a general ship, and one consigns goods, without knowing of the existence of the charter-party, and the ship remains in the possession of the owners by their master and servants, the same as before the charter-party, it was held such person might recover of the owners the same as if no charter-party existed.⁴ Where a charter-party provided there should be no liability for detention of the ship by ice, and it was necessary to use lighters in loading the vessel, and lighterage was delayed by ice, it was held there was no liability for the detention.⁵

4. As we have already seen,⁶ the delivery of the cargo and the payment of freight are to be regarded as concurrent acts, and the carrier by water, who stipulates in the bill of lading for the payment of freight "on right delivery of the cargo," is not obliged to deliver the goods until the consignee is ready and willing to pay the freight.⁷ And where the consignee declined to pay freight until the goods were placed in his store, the master stored the

² *McAndrew v. Chapple*, Law Rep. 1 C. P. 648.

³ *Buckle v. Knoop*, Law Rep. 2 Exch. 125, 333.

⁴ *Sandeman v. Scurr*, Law Rep. 2 Q. B. 86; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420.

⁵ *Hudson v. Ede*, Law Rep. 2 Q. B. 566; *s. p.* *The Great Eastern*, Law Rep. 2 Adm. & Ecc. 88.

⁶ *Supra*, § 176, pl. 2, note 3.

⁷ *Paynter v. James*, Law Rep. 2 C. P. 348.

goods in a warehouse, subject to his own order, and gave notice to the consignee; on a libel against the vessel for non-delivery of the goods, to which the ship-owners pleaded non-payment of freight, it was held they were not responsible for the misconduct of the warehouseman, while the goods were in his possession.⁸ A contract for freight is an entire contract, and not apportionable.

* 5. And where by the terms of a charter-party the defendants covenanted to pay so much as freight of goods delivered at A., it was held, that freight could not be recovered *pro rata itineris*, if the ship was wrecked short of her destination at A., although the defendant accepted his goods at the place where the ship was wrecked.⁹ It is the duty of the carrier in such case, either to repair his ship or procure another and perform the voyage, when he will be entitled to freight under the contract.⁹ But although the carrier cannot recover upon the special contract without proving full performance on his part, the acceptance of the goods by the owner short of their ultimate destination will generally be regarded as implying the assent on his part to pay freight, ratably, for the portion of the carriage performed. But the action should not be brought upon the original contract without alleging the subsequent modification by the acceptance of the goods short of their original destination.¹⁰ And the same general rules seem to have been applied to the question of passage-money, where the passage fails to be performed. The carrier cannot retain the whole passage-money or maintain an action for it, unless he carry the passenger to his destination: nor can he retain or recover *pro rata itineris*, unless he have performed beneficial service, and then not upon the original contract, but upon a *quantum meruit*, or on the ground of the newly given assent of the passenger to terminate the contract after part performance.¹¹ Freight *pro rata itineris* is never due, unless the owner of the cargo voluntarily receive it at a place short of its destination.¹² And where

⁸ The Eddy, 5 Wal. 481.

⁹ Cook v. Jennings, 7 T. R. 381; *supra*, § 188, pl. 33 *et seq.*

¹⁰ LAWRENCE, J., in Cook v. Jennings, *supra*. See also Luke v. Lyde, 2 Bur. 882, and comments on the same. Rossiter v. Chester, 1 Doug. Mich. 154; s. c. 2 Redf. Am. Railw. Cas. 207.

¹¹ Mulloy v. Backer, 5 East, 316; Leman v. Gordon, 8 C. & P. 392.

¹² Caze v. Baltimore Insurance Co., 7 Cranch, 358; Welch v. Hicks, 6 Cow. 804; *supra*, § 188, pl. 35 *et seq.*

the carrier declines to repair his ship or procure another to forward the goods, the acceptance of the same by the shipper is not to be regarded as altogether voluntary.¹³ But the expense of overland transportation, after the goods have been unconditionally received by the consignee at an intermediate port, must be borne by him.¹³ The reservation in the bill of lading of the right of re-shipment of the goods does not discharge or affect the responsibility of the carrier * for the safe delivery of the goods.¹⁴ And where one buys a passage ticket for a particular steamer, which had been at the time lost at sea, without the knowledge of the parties, the holder of the ticket can only recover the amount paid for it.¹⁵

6. It seems to be well settled that where goods are shipped in the ordinary mode by bill of lading it will be regarded as an express contract on the part of the shipper to pay the freight to the carrier, unless the same is paid by the consignee or some other one, although the shipper is not the owner; and the carrier is not obliged to retain the goods until the freight is paid, unless he so stipulate. The usual provision in such contracts, that he may do so, is regarded as intended exclusively for the benefit of the carrier, and one which he may waive at his election, and rely upon his remedy against the shipper.¹⁶ But it is held that the party who obtains goods under a bill of lading impliedly stipulates to pay the freight.¹⁷ But this is merely a cumulative remedy in favor of the carrier.¹⁸ And accordingly where by the charter-party the ship was to deliver goods in London, on the payment of freight, and by the bills of lading the goods were stipulated to be delivered to the shipper or his assigns, he or they paying freight as per charter-party, and some of the goods were sold and the bills of lading assigned to the defendant before the arrival of the goods, and the portion sold defendant upon arrival in London

¹³ *Reed v. Dick*, 8 Watts, 479.

¹⁴ *Little v. Simple*, 8 Mo. 99; *Whitesides v. Russell*, 8 Watts & S. 44.

¹⁵ *Bonsteel v. Vanderbilt*, 21 Barb. 26.

¹⁶ *Wooster v. Tarr*, 8 Allen, 270; 8 Gray, 281, 286, 291-295; *Shepard v. DeBernaes*, 13 East, 565; *Domett v. Beckford*, 5 B. & Ad. 521; *Christy v. Row*, 1 Taunt. 300. The opinion of BIGELOW, C. J., in *Wooster v. Tarr*, states the law on this point in a very satisfactory manner. See also *Barker v. Havens*, 17 Johns. 234; *Layng v. Stewart*, 1 Watts & S. 222.

¹⁷ *Dougal v. Kemble*, 3 Bing. 383.

¹⁸ *BIGELOW, C. J., in Wooster v. Tarr, supra.*

were entered at the custom-house and docks in the name of the defendant, he paying the duties and dues, and obtaining possession of the goods under the bill of lading and indorsement, it was held,¹⁹ that no contract was by law implied on the part of the defendant to pay freight; that was matter of fact to be judged of by the jury from all the facts and circumstances attending the sale. This decision of the Queen's Bench was affirmed in the Exchequer Chamber, that court holding that if such a contract * were implied or inferred from the facts, no action of *indebitatus assumpsit* could be maintained. But if the bills of lading had not referred to the charter-party, so as to be in some sense qualified by it, but had merely stated that the goods were to be delivered to the consignee or his assigns on their paying freight, the taking of the goods under the indorsement would have been evidence from which a jury might have inferred a contract to pay freight; but even in such a case no such contract would arise by mere implication of law, and consequently *indebitatus assumpsit* would not lie. The court refused to award a *venire de novo*, and affirmed the judgment for the defendant. And in a later case²⁰ it was held, that the liability of the consignee or indorser of the bill of lading for freight in such cases is not the result of the original contract of affreightment, but of a new contract, the consideration for which is the delivery of the goods to him at his request.

7. But where the carrier delivers the goods to the indorsee of the bill of lading, without exacting from him the payment of freight, and debits the same to the consignor or shipper, he cannot, after the bankruptcy of the latter, assert a claim for freight, either against the goods or the party to whom he delivered them.²¹

8. Questions have sometimes arisen in passenger transportation by water, where the subsistence is naturally supplied by the carrier, in regard to the extent of departure from what might be

¹⁹ *Sanders v. Vanzeller*, 4 Q. B. 260.

²⁰ *Kemp v. Clark*, 12 Q. B. 647. See also *Holt v. Wescott*, 43 Me. 445; *Fox v. Nott*, 6 H. & N. 630.

²¹ *Tobin v. Crawford*, 9 M. & W. 716. So if the carrier trust to the consignee for freight he cannot fall back on the consignor because the consignee becomes bankrupt before the payment of the freight, he being ready to pay it at the time of receiving the goods, but the party appointed in the bill of lading to receive the same not being present to receive it. *Thomas v. Snyder*, 39 Penn. St. 317.

regarded comfortable fare which will subject the carrier to an action. That must depend altogether upon circumstances, and how far the carrier puts in proper supplies, and furnishes such subsistence as might fairly have been expected under the circumstances. And it is so much the practice of passengers to find fault with their fare, upon voyages of any considerable extent, when the difficulty is more in themselves than anywhere else, that the courts have not, as a general thing, manifested much readiness to listen to complaints of this character. The demands of passengers, far removed * from land, and without sound and healthy appetites, are often very absurd or, at least, unreasonable. It was accordingly said²² that in an action against the captain of a ship for not furnishing good and fresh provisions to a passenger on a voyage, the jury must be satisfied that there has been a real grievance sustained by the plaintiff, — that he has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he is therefore to have a right of action against the captain who does not provide all that he ought. The passenger must have sustained a real grievance, and not one that is mainly imaginary.

9. Questions have sometimes arisen in the English courts how far the captain of a passenger ship may justify excluding a passenger from the table, in the caddy or saloon, and require him to take his meals in his own apartment, on the ground of ungentelemanly manners or conduct. Such questions would not be likely to occur either there or here at the present day, unless from the excessive use of stimulants, or passionate excitement of some kind. Where a passenger behaves as well as he knows how, it is all that can be required. If he still fails to meet the demands of the average standard of refinement in social intercourse, he is less in fault, perhaps, than the framers of the dogmas to which he is expected to conform. But if he makes a brute of himself, either by drink or passion, he becomes an unfit companion of sober men, and may properly be required not to come among them.²² If the carrier improperly exclude the husband from table, and the wife prefers on that account to take her meals with her husband, it will be regarded as an improper exclusion of both, and the carrier responsible accordingly.²³

²² *Young v. Fewson*, 8 Car. & P. 55.

²³ *Pendergrast v. Compton*, 8 Car. & P. 454.

10. It seems that carriers are responsible for damages occurring to goods by reason of being stowed on deck in tempestuous weather, unless such stowage be authorized by custom or the consent of the shipper.²⁴ And so also, where the carrier improperly stows the goods on deck, whereby a portion of them is lost, he cannot recover for the freight of the remainder, provided the portion lost was of greater value than the freight due.²⁵ But if the carrier *is not in fault in regard to stowage of goods on deck, that being done by the consent or express contract of the owner of the goods, he cannot be compelled to contribute for the jettison of the goods.²⁶ But where the goods are laden upon deck, according to the custom of a particular trade, the owner of the ship is held responsible for contribution to the owner of the goods, for their loss.²⁷ So, where goods are thrown overboard in order to save the ship and the remainder of the cargo, and that is effected, it is equitable and in conformity with the rules of law that both the ship and the cargo thus saved should contribute to the loss on the basis of general average.²⁸ And where goods of a particular description are, in conformity with a notorious custom, stowed in a particular way, shippers who consider such mode of stowage hazardous must notify carriers of their³ desire to have a different one adopted, or they will not be entitled to charge the carrier with damages received in consequence of it.²⁹

11. If the carrier, in consequence of non-compliance with the regulations of the port, expose the goods to forfeiture, he thereby becomes responsible to the owners. It is the duty of the carrier, and his servants and agents, in making delivery at the port of destination, to learn the laws and regulations there in force, and

²⁴ *Barber v. Brace*, 3 Conn. 9; *Smith v. Wright*, 1 Caine's Cas. 48.

²⁵ *Waring v. Morse*, 7 Ala. 843.

²⁶ *Dodge v. Bartol*, 5 Greenl. 286.

²⁷ *Gould v. Oliver*, 4 Bing. N. C. 134.

²⁸ *Rossiter v. Chester*, 1 Doug. Mich. 154; s. c. 2 Redf. Am. Railw. Cas. 267. This rule of the maritime law as enforceable in the courts of admiralty, is here fully recognized; but on the ground that the case occurred on the lakes, where at that time the admiralty jurisdiction did not obtain, it was held, that the claim was not enforceable in the courts of common law. See also *Lawrence v. Minturn*, 17 How. 100, where the general subject of the liability of other parties and interests to contribute to a necessary loss by jettison is thoroughly discussed.

²⁹ *Baxter v. Leland*, 1 Abbott Adm. 348.

make the delivery in conformity therewith, so as not only to land the goods, but to do it in such a legal manner as to place them within the power of the consignees.³⁰

12. The following case is of sufficient importance to justify stating at length. Although a common carrier of passengers at sea, as the master of a steamship, may properly refuse a passage to a person who has been forcibly expelled by the actual, though violent and revolutionary authorities of a town, under threat of * death if he return, and when the bringing back and landing of such passenger would, in the opinion of such master, tend to promote further difficulty, yet such refusal should precede the sailing of the ship. If the passenger have violated no inflexible rule of the ship in getting on board the vessel, have paid or tendered through himself or a friend, the passage-money, and have conducted himself properly during the voyage, the master has no right, as matter of law, to stop a returning vessel, put him on board of it, and send him back to the port of departure. And if he do so, damages will be awarded against him on proceedings in admiralty. However, where a person who had been thus banished from a place, got on board a vessel going back to it, determined to defy the authorities there and take his chance of life, and the captain, who had not known the circumstances of the case until after getting to sea, on meeting a return steamer of the line to which his own vessel belonged, stopped his own and sent the man on board the returning vessel to be taken back to the place of departure, such captain not acting from any malice, but from a humane motive, and under the belief that the passenger would be hanged if landed at the port to which his own vessel was going, in such a case, the apprehended danger mitigates the act, and the damages must be small. Accordingly the Supreme Court on appeal from a decree giving the plaintiff four thousand dollars, modified it by directing that the damages must be reduced to fifty dollars, and moreover ordered that each party should pay his own costs on the appeal. In such a case a passenger is entitled to compensation for the injury done him by being put on board the returning vessel, so far as that injury arose from the act of the captain of the other vessel in putting him there. But he is not entitled to damages for injuries from obstructions which he afterwards met in going to the place from which he had been expelled,

³⁰ *Howland v. Greenway*, 22 How. 491.

and to which he desired to return; and which injuries were not caused by the act of this captain, but were owing to the fact that all to whom he afterwards applied for passage to that place were aware of the power and determination of the authorities there, and therefore refused to carry him back.²¹

²¹ *Pearson v. Duane*, 4 Wal. 605.

* CHAPTER XXVII.

COMMON CARRIERS OF PASSENGERS.

SECTION I.

Degree of care required.

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| <ol style="list-style-type: none"> 1. Common carriers of passengers are responsible for the utmost care and watchfulness. 2. Duty extends to everything connected with the transportation. 3. But it does not amount to an insurance of safety. 4. It makes no difference that the passenger pays no fare, unless exemption is part of the contract. 5. Nor that the train is hired for an excursion, or is under control of state officers. 6. Degree of care required not easy of definition. 7. Passenger carriers not responsible for accidents without fault. 8. Carriers of passengers contract only for their own acts. 9. But if carriers by rail, they must adopt every precaution in known use. 10, 11. What will constitute dereliction of duty in that regard. | <ol style="list-style-type: none"> 12. Duty to inform passengers of peril requiring caution to escape. 13. Person purchasing a ticket becomes a passenger, and is entitled to protection in reaching his seat in the carriage. <ol style="list-style-type: none"> a. (e). So a person riding free by invitation, &c. may be a passenger and entitled to protection as such. 14. Passenger carriers bound to exclude disorderly persons from their carriages. 15. And bound to fence their stations so as to hinder passengers entering by a dangerous way. <ol style="list-style-type: none"> a. (f). And also to protect passengers in other respects in waiting at stations and in going to and from carriages. 16. Passenger carrier, carrying ordinary passengers and soldiers at the same time, responsible for consequences. |
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§ 192. 1. It is agreed on all hands that carriers of passengers are only liable for negligence, either proximate or remote, and that they are not insurers of the safety of their passengers, as they are as common carriers of goods and of the baggage of passengers. (a) The rule is clearly laid down in one of the early

(a) It is said, however, in many cases that carriers of passengers are bound to exercise the highest degree of care and skill. *Pennsylvania Railroad Co. v. Roy*, 102 U. S. 451; *Railroad Co. v. Varnell*, 98 U. S. 479; *Pittsburg & Connellsville Railroad Co.*

v. Pillow, 76 Penn. St. 510; *George v. St. Louis, Iron Mountain, & Southern Railway Co.*, 34 Ark. 613; *Brunswick & Albany Railroad Co. v. Gale*, 56 Ga. 322; *Baltimore & Ohio Railroad Co. v. Wightman*, 29 Gratt. 431; *Dela-ware, Lackawanna, & Western Rail-*

cases,¹ by EYRE, C. J., that carriers of passengers "are not liable for injuries happening to passengers from unforeseen accident or misfortune, where there has been *no* negligence or default in the driver." — "It is said he was driving with reins so loose that he could not readily command his horses; if that was the case the defendants are liable; for a driver is answerable for the *smallest negligence*." This is now the settled rule upon the subject, as applicable to all modes * of carrying passengers by those who hold themselves out as public or common carriers of passengers.²

¹ *Aston v. Heaven*, 2 Esp. 533; *s. p.* *Frink v. Potter*, 17 Ill. 496. See also *Munroe v. Leach*, 7 Met. 274.

² *Christie v. Griggs*, 2 Camp. 79; *Harris v. Costar*, 1 Car. & P. 686; *White v. Boulton*, Peake Ad. Cas. 81; *Sharp v. Grey*, 9 Bing. 457. Passenger

road Co. *v.* Dailey, 37 N. J. Law, 526; *Jamison v. San Jose & Santa Clara Railroad Co.*, 55 Cal. 593; *Leslie v. Wabash, St. Louis, & Pacific Railroad Co.*, 26 Am. & Eng. Railway Cas. 229. But see *Grand Rapids & Indiana Railroad Co. v. Huntley*, 38 Mich. 537; *Michigan Central Railroad Co. v. Coleman*, 28 Mich. 410; *Louisville Railway Co. v. Weams*, 80 Ky. 420. And see *Gilson v. Jackson County Horse Railway Co.*, 76 Mo. 282, where it is said that the company is bound to use the utmost care and diligence of a cautious person. See *infra*, pl. 6. Where a train is derailed, and passengers injured by inevitable accident, the company is not bound to furnish medical attendance, and a division superintendent has no power to bind the company therefor. *Union Pacific Railroad Co. v. Beatty*, 26 Am. & Eng. Railw. Cas. 84.

The rule of law, that the care exercised by a carrier of passengers should be according to the consequences that may result from carelessness, applies where carriage is by freight trains as well as where it is by passenger trains. It is founded deep in public policy and should be

adhered to. *Indianapolis & St. Louis Railroad Co. v. Horst*, 93 U. S. 291. But where such carriage is against the rules of the company, the passenger cannot recover for an injury. *Houston & Texas Central Railway Co. v. Moore*, 49 Tex. 31. Where, however, the conductor permits the carriage, *contra*. *Creed v. Pennsylvania Railroad Co.*, 86 Penn. St. 139. And see *St. Paul, Minneapolis, & Manitoba Railway Co.*, 18 Fed. Rep. 221; *Lucas v. Milwaukee & St. Paul Railway Co.*, 33 Wis. 41.

A sleeping-car company must use reasonable and ordinary care to prevent the intrusion of thieves. *Pullman Palace Car Co. v. Gardner*, 16 Am. & Eng. Railw. Cas. 324. But it is not liable for a pocket-book taken from under the head of a sleeping passenger. *Stearn v. Pullman Palace Car Co.*, 8 Ont. 171. Such companies are not liable for property of a passenger as innkeepers, nor as common carriers, but they are bound to use ordinary care, to be measured by the danger reasonably to be apprehended. *Dargan v. Pullman Palace Car Co.*, 26 Am. & Eng. Railw. Cas. 149.

2. And the obligation of care and watchfulness extends to all the apparatus by which passengers are conveyed.³ (b) In this last case it is said: "The obligation of a stage proprietor, in regard to carrying passengers safely, has reference to the team, the load, the state of the road, as well as the manner of driving." In another case the rule is somewhat more elaborated,⁴ by BEST, C. J.: "The action cannot be maintained unless negligence be proved, and whether it be proved is for the determination of the jury. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. *If there be the least failure in one of these things* the duty of the coach proprietors is not

carriers owe a higher degree of diligence and watchfulness toward passengers than toward strangers. *State v. Baltimore & Ohio Railroad Co.*, 24 Md. 84.

³ *Taylor v. Day*, 16 Vt. 566; *Curtis v. Drinkwater*, 2 B. & Ad. 169. See *Sales v. Western Stage Co.*, 4 Iowa, 541.

⁴ *Crofts v. Waterhouse*, 3 Bing. 319. A similar rule is adopted in *Farish v. Reigle*, 11 Grat. 697. The coach-owner, or his servants, must examine his coach before each trip, or he is chargeable with negligence if any accident happen through defect of the coach. And if any irregularity is pointed out, the driver must look to it immediately. *Brenner v. Williams*, 1 C. & P. 414, BEST, C. J.

(b) There is an implied contract on the part of the company that the road is safe and sufficient, and that the cars are safe and trustworthy. *Philadelphia & Reading Railroad Co. v. Anderson*, 94 Penn. St. 351. The company may assume that rolling stock, bought from reputable makers, is all right, if on the usual inspection it appears to be so. *Grand Rapids & Indiana Railroad Co. v. Huntley*, 38 Mich. 537. This applies to car wheels. *Toledo, Wabash, & Western Railroad Co. v. Beggs*, 85 Ill. 80. The company must apply to the boilers of locomotives every test recognized by experts as necessary, but for defects not discoverable by such tests, it is not liable. *Robinson v. New York Central & Hudson River Railroad Co.*, 20 Blatch. 388. And the company must so construct the road-bed and track as to avoid dangers such as competent engineers might reasonably foresee as the result of the ordinary rainfall and consequent floods peculiar to the country. *International & Great Northern Railroad Co. v. Halloren*, 53 Tex. 40. But otherwise as to extraordinary and unanticipated floods. *Ib.* That the construction was under a competent engineer, and approved by him, will not avail, however. *Philadelphia & Reading Railroad Co. v. Anderson*, 94 Penn. St. 351.

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fulfilled, and they are answerable for any injury or damage that happens." The rule of care and diligence thus laid down has been very generally adopted in this country.⁵ The fact

⁵ *Boyce v. Anderson*, 2 Pet. 150; *Stokes v. Saltonstall*, 13 Pet. 181, 192; *Fuller v. Naugatuck Railroad Co.*, 21 Conn. 557; *Hall v. Connecticut River Steamboat Co.*, 13 Conn. 319; *Camden & Amboy Railroad Co. v. Burke*, 13 Wend. 611, 626; *McKinney v. Neil*, 1 McLean, 540; *Maury v. Talmadge*, 2 McLean, 157; *Stockton v. Frey*, 4 Gill, 406; *Hollister v. Nowlen*, 19 Wend. 236; s. c. 2 Redf. Am. Railw. Cas. 96; *Derwort v. Loomer*, 21 Conn. 245. But a passenger carrier is not responsible for any loss or expense of the passengers consequent upon quarantine regulations. *New Orleans v. Windermere*, 12 La. An. 84. See *Alden v. New York Central Railroad Co.*, 26 N. Y. 102; s. c. 2 Redf. Am. Railw. Cas. 418, where the company was held liable for an injury resulting from a crack in the axle of a car, undiscoverable by any practicable mode of examination. But in *McPadden v. Same*, 44 N. Y. 478, s. c. 47 Barb. 247, this case is questioned, and the proposition reiterated, that passenger carriers are not to be held as insurers of the safety of those they carry; and that the requirement that they should be furnished with perfect roadway and carriages will not make them responsible for injuries caused by *vis major*, as the breaking of a rail in consequence of extreme cold. And if the plaintiff claims the rail was broken before the train came on it, he must give evidence to prove it.

The rule in Connecticut was first settled, in 13 Conn. 326, that carriers of passengers are "bound to the highest degree of care that a reasonable man would use." This has been adhered to in all the subsequent cases, and is substantially the same as the English rule, and as that adopted in the other States, and in the United States Supreme Court, 13 Pet. 190, where Mr. Justice BARBOUR indorses the charge of the Circuit Court, that the carrier of passengers is liable "if the disaster was occasioned by the least negligence, or want of skill or prudence on his part."

But in *Boyce v. Anderson*, 2 Pet. 150, Chief Justice MARSHALL lays down the rule of care, in such cases, as that of ordinary care, — the care which all bailees for hire owe the employer. The court, in *Stokes v. Saltonstall*, 13 Pet. 192, attempt to escape from this rule, on the ground that the remarks in the former case had reference exclusively to the carriage of slaves, and that the rule laid down would not of necessity apply to ordinary passengers. But it is observable that the learned chief justice makes no such distinction, and also, that the nearer the thing transported comes to the condition of property merely, the higher the degree of care and responsibility, so that the argument seems to cut the other way.

This subject is referred to here, not with a view to go into the question of the real coincidence of the degree of care required of carriers of passengers with that required of ordinary bailees for hire, but merely to state that it seems to the writer that the cases really come up to nothing more than that which is required of every bailee for hire, that he should conduct the business as prudent men would be expected to conduct their own business of equal

that injury was suffered by * any one while upon the company's trains as a passenger, through any failure of the means of safe

importance. And if the business be of the highest moment, then the care, skill, and diligence should be also of the most extreme character. See also *Fletcher v. Boston & Maine Railroad Co.*, 1 Allen, 9; *Holly v. Boston Gas Light Co.*, 8 Gray, 123, 181. If the degree of care and watchfulness is to be in proportion to the importance of the business, and the degree of peril incurred, it is scarcely possible to express the extreme severity of care and diligence which should be required in the conduct of passenger trains on railways. Hence very few cases of accident and injury have occurred where it was not considered in some measure attributable to a want of the requisite degree of care. The case of *Briggs v. Taylor*, 28 Vt. 180, 184, goes into this general subject of the degrees of care and diligence in all cases of trust and confidence. s. c. 2 Redf. Am. Railw. Cas. 558.

But see *Hood v. New York & New Haven Railroad Co.*, 22 Conn. 1, 15; *Galena & Chicago Railroad Co. v. Yarwood*, 15 Ill. 468; *Philadelphia & Reading Railroad Co. v. Derby*, 14 How. 468; *Pennsylvania Railroad Co. v. Aspell*, 23 Penn. St. 147, 149; *New Jersey Railroad Co. v. Kennard*, 21 Penn. St. 203; *McElroy v. Nashua & Lowell Railroad Co.*, 4 Cush. 400; 16 Barb. 356. In *Taylor v. Radway*, 48 N. H. 304, the duty of passenger carriers is very extensively discussed, and the utmost rigor of the rule of extreme diligence strenuously insisted on. The idea sometimes thrown out, that the precautions taken to secure safety must be restricted within practicable limits, as to expense, was there condemned, as calculated to mislead the jury into the belief that the carrier, having taken such precautions to secure the safety of his passengers as come within his resources, is absolved. The court hold, in substance, that no one is justified in undertaking the perilous business of transporting passengers on a railway by steam, unless he has first adopted all known precautions to secure safety, without regard to the question of expense. The accident at Seabrook, N. H., in October, 1872, is well calculated to illustrate the importance of securing safety to passengers by adopting all known precautions. The passenger train in that case by means of a misplaced switch was driven into the rear of a freight train, standing on a siding for the passenger train to pass it. The engineer saw the misplaced switch two hundred feet before the train reached it, and signalled for brakes, reversed the engine, and jumped off in time to escape all harm. Had the train been supplied with the air-brake it might have been brought nearly to a stand before the collision, and, as it was, the Pullman car entirely resisted the shock, and every passenger in it remained wholly unharmed, while, in the ordinary cars, three were killed outright and seventeen wounded. See also *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, *infra*, note 20. But in *Baltimore & Ohio Railroad Co. v. State*, 29 Md. 252, the old rule is stated in the old way, that the carrier is bound to use every practicable known and approved precaution against injury to passengers, but not every possible device which ingenuity might suggest. See also *Railroad Co. v. State*, Md. 420. A passenger carrier by street railway is bound to protect from injury those passengers whom they place in exposed

transportation, is regarded as *prima facie* evidence of their liability.⁶

positions, as on the front platform. *Schneider v. Brooklyn City Railroad Co.*, 1 Am. Law Rec. 121. Where railways regularly attach a passenger car to their freight trains, and carry all who desire, they must give those who desire to come on or leave the car a safe landing-place, and if one is injured in passing along the track to reach the car, by falling into a hole, the company will be responsible for the damages. *Dillaye v. New York Central Railroad Co.*, 56 Barb. 30.

In *Caldwell v. Murphy*, 1 Duer, 241, the court say: "The charge of the judge, that the law exacted from a carrier of passengers extraordinary care and diligence, and that they are liable unless the injury arises from force or pure accident, was entirely correct." And in *Ingalls v. Bills*, 9 Met. 1, the same rule is adopted. The injury here occurred from the breaking of the axle, through a flaw in the iron not visible from the outside, and the defendant had been at great care and expense in procuring a coach of the best materials and workmanship, as he supposed; and the court say, that carriers of passengers are "bound to use the *utmost care and diligence* in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and if accident happens through defect in the coach, which might have been discovered and remedied upon the most thorough and careful examination of the coach, the owner is liable. But if the injury arise from some invisible defect which no ordinary test will disclose, like that in the present case, the carrier is not liable." *Frink v. Potter*, 17 Ill. 406; *Galena & Chicago Railroad Co. v. Fay*, 16 Ill. 558. See also *Wilkie v. Bolster*, 3 E. D. Smith, 327. And in an English case, *Manser v. Eastern Counties Railway Co.*, 3 Law T. n. s. 585, Exch., where the accident occurred from the breaking of the tire of a driving-wheel, where the defect could not be discovered by the original test, but where it might have been if it had been repeated when the tire was re-turned, after being considerably worn, the company was held liable.

Slaves are to be regarded as passengers, and carriers only liable from negligence in carrying them. *McClenaghan v. Brock*, 5 Rich. 17. But a railway company which takes a slave on a train and transports him for the usual fare for negroes, such slave having only a general pass, or permit, when the law of the state requires such permit to specify the length of time the slave is to be absent, and the places he is to visit, this being done without the knowledge of the owner of the slave, is liable for a conversion, and for all the injuries received by such slave in consequence of such transportation, whether occurring from the negligence of the company, or not. *Macon & Western Railroad Co. v. Holt*, 8 Ga. 157. See also, on the general subject of this note, *Black v. Carrollton Railroad Co.*, 10 La. An. 33.

⁶ DENMAN, C. J., at *Nisi Prius*, in *Carpue v. London & Brighton Railroad Co.*, 5 Q. B. 747; *Laing v. Colder*, 8 Penn. St. 479, 483; *Galena & Chicago Railroad Co. v. Yarwood*, 15 Ill. 468, 471; *Hegeman v. Western Railroad*

* 3. So, too, evidence that the cars did not stop at a way station the usual time, and that a passenger is injured in getting out, is

Co., 16 Barb. 353, 356 ; *Holbrook v. Utica & Schenectady Railroad Co.*, 16 Barb. 113 ; *Curtis v. Rochester & Syracuse Railroad Co.*, 20 Barb. 282. The same rule had obtained in actions against carriers of passengers by coaches. *Stokes v. Saltonstall*, 13 Pet. 181 ; *infra*, pl. 10, and notes. See *Skinner v. London, Brighton, & South Coast Railway Co.*, 5 Exch. 787 ; s. c. 2 Eng. L. & Eq. 360, to same effect. But in *Holbrook v. Utica & Schenectady Railroad Co.*, 12 N. Y. 236, the court seem to deny that a presumption of negligence arises in all cases of injury to passengers. In this case the wife's arm, while in the window of the car, was broken by something coming in contact with the car in passing stationary carriages of the company on another track. The court say that in cases of this kind the burden of showing negligence is on the plaintiff, and the presumption is an inference of fact for the jury, from the cause of the injury and the circumstances attending. s. p. *Curtiss v. Rochester & Syracuse Railroad Co.*, 18 N. Y. 534. But see *Transportation Co. v. Downer*, 11 Wal. 129 ; *infra*, § 193, note 18. In *Galena & Chicago Railroad Co. v. Yarwood*, 17 Ill. 509, s. c. 15 Ill. 468, it is held, that a passenger in a railway car need only show that he has received an injury, to make a *prima facie* case against the carrier ; the carrier must rebut the presumption, in order to exonerate himself. Negligence is a question of fact, which the jury must pass upon. Persons in positions of great peril are not required to exercise all the presence of mind and care of a prudent, careful man, under ordinary circumstances ; the law makes allowance for them, and leaves the circumstances of their conduct to the jury. See *Albright v. Penn.*, 14 Texas, 290. In *Laing v. Colder*, 8 Penn. St. 483, it was held, that where passengers in a railway car are liable to have their arms caught in passing bridges if lying out of the windows, it is the duty of the conductors of the train to give such notice to them as will put them effectually on their guard, or the company will be liable for all such injuries, and that it is not sufficient to trust to printed notices put up in the cars. But in regard to such perils as ordinarily attend railway travelling, and which must be apparent to all passengers of common experience, like passing from car to car, or standing on the platforms, when the train is in motion, it is probable that general notice would be sufficient, and a passenger who voluntarily exposes himself to extraordinary peril, having no necessity or excuse for doing so, should not be allowed to recover for damage thereby accruing. But if he have a necessity for doing so, and damage accrue in consequence of the negligent conduct of the train, he ought not, perhaps, to be precluded from a recovery. See also *Christie v. Griggs*, 2 Camp. 79 ; *Ware v. Gay*, 11 Pick. 106 ; *Stockton v. Frey*, 4 Gill, 406 ; *Nashville & Chattanooga Railroad Co. v. Messino*, 1 Sneed, 221. In *Frink v. Potter*, 17 Ill. 406, it was held, that the proprietor of a stage-coach is liable for an injury to a passenger, resulting from the breaking of an axle-tree by the effect of frost. If the carrier knew, or might have known by the exercise of extraordinary care and attention, that danger would result from using a coach in such manner and under such circumstances, and that the

* good evidence against the company in an action to recover for the injury.⁷ In an action for damages sustained by a passenger

danger could have been avoided, he is liable. And if such danger exists as cannot be avoided, and so imminent as to deter prudent men from encountering it in their own business, the carrier should, it would seem, refuse to proceed. Passengers should not be pushed into inevitable danger, without being consulted. But if, being informed, they choose to incur the hazard, probably it should be regarded as their own misfortune if they suffer damage in spite of the best efforts of the carrier and his servants.

In *Hegeman v. Western Railroad Co.*, 16 Barb. 353, the plaintiff, a passenger, had sustained an injury by the breaking of a car-axle, and it was claimed to be neglect in the company in not providing safety-beams. It was held, that evidence might be received to show the utility of the invention, and that it was proper to submit the question of negligence to the jury, and that it made no difference whether the company made the car or not. In *Gillenwater v. Madison & Indianapolis Railroad Co.*, 5 Ind. 340; *Farish v. Reigle*, 11 Gratt. 697, it was held to afford no presumption against the negligence of the company, that it had selected its servants with care with reference to their competency, or that the act by which the plaintiff sustained injury was done without the sanction of the company.

In 13 N. Y. 9, *Hegeman v. Western Railroad Co.* is affirmed, and the proposition in regard to the liability of the company for defects in cars manufactured or purchased is distinctly reaffirmed, *DENIO* and *MARVIN, JJ.*, dissenting. s. c. 2 Redf. Am. Railw. Cas. 414. The Court of Appeals recognizes the rule of care and diligence, to which allusion has already been made, that its extent is to be measured by the known perils to which passengers are exposed, and that something more is required in railway transportation than in carrying passengers by coaches.

The same question has been examined in *Readhead v. Midland Railway Co.*, Law Rep. 2 Q. B. 412; s. c. 17 W. R. 737; Law Rep. 4 Q. B. 379. In the Court of King's Bench the majority of the court held to the common rule of extreme diligence on the part of passenger carriers, but held that they are not bound at their peril to provide roadworthy carriages at the commencement of the journey, and that they are not responsible for any damage resulting from a defect which could neither be guarded against in the construction nor removed by subsequent examination. But *BLACKBURN, J.*, held that it is incumbent on the carrier to provide at his peril a vehicle in fact reasonably

⁷ *Fuller v. Naugatuck Railroad Co.*, 21 Conn. 557. And in *Southern Railroad Co. v. Kendrick*, 40 Miss. 374, it is said that it is the duty of passenger carriers, by railway, to carry safely to the place of destination, to announce audibly in each car the station, and then to allow sufficient time for the passengers safely to leave the carriages; and that it is the duty of the passengers to use reasonable care, and to conform to the usages and customs of the company, and of that mode of transportation, as far as known and understood by them.

on a * railway, by the breaking down of a bridge, it is no excuse that the bridge was built by a competent engineer.⁸ But it seems

sufficient for the journey, and that he is responsible for the consequences of any insufficiency, though arising from a latent defect. And this opinion seems not unreasonable, nor an essential departure from the ordinary rule. But in the Exchequer Chamber the opinion of the majority of the King's Bench is affirmed, and the New York cases examined and repudiated. The rule there laid down seems to be, that, although the carrier of passengers may be responsible for deficiencies caused by want of skill or care in the manufacture of the carriages used, he is not to be so held, where the defect could not have been avoided in the manufacture or detected by examination. The case is one of such extreme improbability, and, if ever occurring, one so little likely to occur frequently, that the practical difference between the two propositions is not of much importance, although in principle it is very considerable. See also *Meir v. Pennsylvania Railroad Co.*, 27 Phila. 229, where AGNEW, J., adopts the view of the English courts, which, indeed, seems more consistent with the true ground of the responsibility of passenger carriers than that in New York. But the rule in New York does not seem to be so fully settled there as not to encounter some protest from the judges. See the question discussed by the Appeal Commission in *McPadden v. New York Central Railroad Co.*, 44 N. Y. 473. It seems to be there asserted that the case of *Alden v. New York Central Railroad Co.*, *supra*, rests on no sufficient authority, so far as it imposes on passenger carriers the absolute duty of providing a perfect roadway and perfect vehicles for the transportation, and that if it is regarded as authority to that extent its operation should be restricted to the carrying of passengers by railway. But LEONARD, J., says that *Alden's* case does not in fact establish any new rule of responsibility for passenger carriers, but only renders them responsible for all injuries caused by any defect in the apparatus of transportation which "could have been discovered or remedied by any possible care, skill, or foresight," which must, of course, embrace all defects in the manufacture. This would seem to leave few defects in the means of transportation for which passenger carriers are not responsible. *s. p.* *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282. It is here said, passenger carriers by steam are bound to adopt all precautions against accident which science has demonstrated and practice verified, but the mere fact that the carrier has not adopted all improvements or securities known to science is not conclusive evidence of negligence, but may be considered as tending to prove it.

And in *Curtiss v. Rochester & Syracuse Railroad Co.*, 20 Barb. 282, where the injury occurred from a misplacement of the rails, a collision being caused thereby, it was held that the company was bound to see that the rails were in the right position, and not to trust exclusively to the lever of the switch, when the rails were in open view, and also to see that the rails were firmly secured; that evidence that the switch was placed right did not rebut all presumption of negligence; that it was a question for the jury, under all the facts

* *Grote v. Chester & Holyhead Railway Co.*, 2 Exch. 251.

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to have * been doubted by the court in this case, whether the company could have been chargeable with any fault, if they had adopted the * best mode of constructing the bridge, and the best materials, under the supervision of a competent engineer. This seems to be stating * a case where the bridge could not have fallen but by an earthquake or some convulsion of nature, for which the company are in * no sense liable. Where the track of a railway was carried over an embankment of loose sand, likely to be washed away by water, and where the culverts were insufficient to carry off the water, but it not being shown that the embankment had been washed away before, or that the water had ever come up to it, and it being shown, that after the continuance of a very extraordinary storm for a long time, an express train, passing this point at the usual rate, had been thrown from the rails, and the plaintiff in consequence being injured, it was held, that there was slight or no evidence of negligence * on the part of the company, and a verdict of £1,500 in favor of the plaintiff was set aside as being against evidence.⁹ The bed of the road had in fact

and circumstances. So also the company was held liable where the injury occurred from coming in contact with an animal on the track, which might have been seen early enough to stop the train, and where the train was moving at an unreasonable rate of speed, and no signal given, or effort made to arrest the speed. *Nashville & Chattanooga Railroad Co. v. Messino*, 1 Sneed, 220. And where a passenger in an omnibus was injured by the bursting of a lamp, it was held to be incumbent on the carrier to show by affirmative proof that the fluid used in the lamp was a safe and proper article for such uses. *Wilkie v. Butler*, 3 E. D. Smith, 827. The fact of an animal's being on the track is *prima facie* evidence of negligence in the company, the company being bound as between itself and its passengers to keep the road free from all obstructions of that character. *Sullivan v. Philadelphia & Reading Railroad Co.*, 30 Penn. St. 284; *infra*, § 204 a, note 1; s. c. 2 Redf. Am. Railw. Cas. 564; 6 Am. Law Reg. 342, where the question of the responsibility of passenger carriers and the burden of proof or presumption of negligence is very carefully considered.

Where the company gives notice under the statute that it will not hold itself responsible for injury to passengers standing on the platforms, such notice being posted up in the cars, waiver of the notice is not to be presumed from failure of the conductor to warn the passenger to leave the platform. *Higgins v. New York & Harlem Railroad Co.*, 2 Bosw. 132. See also *Chicago, Burlington, & Quincy Railroad Co. v. George*, 19 Ill. 510. The fact that a train was running several hours out of time, is presumptive evidence of gross negligence. *Ib.* Some of the questions discussed in this note are considered *infra*, § 193, and notes.

⁹ *Withers v. North Kent Railway Co.*, 3 H. & N. 969.

become undermined, and the sleepers were unsupported in consequence of the rush of water and the carrying off of a bridge above the embankment, it being about midnight at the time the accident occurred, but no evidence to show that the servants in charge of the train were aware of the bad condition of the track, or that the water had come up to the embankment. Water was seen, but not upon the line. The court seemed to think the company not bound to build their track so as to withstand such extraordinary floods. But it certainly deserves consideration whether there is not rashness in driving an express train at the usual rate of speed under such perilous circumstances. We should not expect a jury to hesitate much upon a question of that character.

4. The liabilities of the company attach, although the passenger was riding upon a free ticket as a newspaper reporter.¹⁰ (c)

¹⁰ *Hodges* Railw. 621; *Great Northern Railway Co. v. Harrison*, 12 C. B. 576; s. c. 26 Eng. L. & Eq. 443; *Gillenwater v. Madison & Indianapolis Railroad Co.*, 5 Ind. 340. And in *Nolton v. Western Railroad Co.*, 15 N. Y. 444, it is held that where a railway voluntarily undertakes to convey a pas-

(c) *Waterbury v. New York Central & Hudson River Railroad Co.*, 17 Fed. Rep. 671; *Lemon v. Chanslor*, 68 Mo. 340; *Ohio & Mississippi Railway Co. v. Selby*, 47 Ind. 471; *Gradin v. St. Paul & Duluth Railway Co.*, 30 Minn. 217. And the company cannot limit its liability to such passengers. *Buffalo, Pittsburg, & Western Railroad Co. v. O'Hara*, 9 Am. & Eng. Railw. Cas. 317. Certainly not its liability for gross negligence. *Jacobus v. St. Paul & Chicago Railroad Co.*, 20 Minn. 125. But see *Grand Trunk Railway Co. v. Stevens*, 95 U. S. 655. And see *contra*, *Sutherland v. Great Western Railway Co.*, 7 U. C. C. P. 409, where it is held that a contract in a free pass limiting the liability of the company is valid. And see also to the same effect, *Duff v. Great Northern Railway Co.*, Law Rep. 4 H. L. 178; *Gallin v. London & Northwestern Railway Co.*, Law Rep. 10 Q. B. 212; *Gulf, Colorado, & Santa Fe Railroad Co. v. McGowan*, 26 Am. & Eng. Railw. Cas. 274. And see *Griswold v. New York & New England Railroad Co.*, 26 Am. & Eng. Railw. Cas. 280. Upon the general question, see also *Atchison & Nebraska Railroad Co. v. Flinn*, 24 Kan. 627; *Ohio & Mississippi Railway Co. v. Nickless*, 71 Ind. 271. But a mere trespasser, one who "steals a ride," is not a passenger, and not entitled as such to protection. *Pennsylvania Railroad Co. v. Price*, 96 Penn. St. 256. Nor is one who travels on a non-transferable pass to another whom he represents himself to be. *Toledo, Wabash, & Western Railway Co. v. Beggs*, 85 Ill. 80. Or one who fraudulently induces the conductor to pass him in disregard of his duty to the company. *Toledo, Wabash, & Western Railway Co. v. Brooks*, 81 Ill. 245. And see *Chicago & Alton Railroad Co. v. Michie*, 83 Ill. 427. See further, *infra*, § 203.

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But it * has sometimes been claimed to admit of some question, whether such passenger could always exact the same degree of care and watchfulness as one who paid fare, especially where his ticket, as is not unusual in such cases, contained a notice that passengers who used such ticket rode at their own risk, and the company would not be responsible for the safety of such passengers or their baggage. But the subject is very much discussed in one very important case,¹¹ in the national tribunal of last resort,

senger on its road, whether with or without compensation, if such passenger be injured by the culpable negligence or want of skill of the agents of the company, the company is liable, in the absence of an express contract exempting it. The point of the degree of care requisite in such cases is here discussed, but not decided. But the argument is in favor of that for which we contend, — that the care, diligence, and skill required in any particular business is determined by the difficulty and peril of the business rather than by the consideration of the undertaking. This is the case of a mail agent carried as an accessory of the mail referred to, *infra*, § 251, pl. 5. Although the court seem to regard it as a case of gratuitous transportation it seems as if it should not be so considered, but as a carrying for compensation by the contract, although nothing in particular was paid for the fare of the agent as such. An agreement on a free pass, that the person accepting it assumes all risk of personal injury and loss or damage to property whilst using the trains of the company, “does not exempt the company from liability for gross negligence.” *Indiana Central Railroad Co. v. Mundy*, 21 Ind 48. See *Ohio & Mississippi Railroad Co. v. Muhling*, 30 Ill. 9, where it is held that the responsibility of a railway company for the safety of its passengers does not depend on the kind of cars in which they are carried, nor on the fact of payment of fare by the passenger. But see *Bissell v. New York Central Railroad Co.*, 25 N. Y. 442, where a contract with a cattle-dealer, providing that “persons riding free, to take charge of their own stock, do so at their own risk of personal injury from whatever cause,” is held binding. In every case where one takes passage with a common carrier of passengers, there is, in the absence of special contract, one implied for safe transportation and for fare. *Frink v. Schroyer*, 18 Ill. 416.

¹¹ *Philadelphia & Reading Railroad Co. v. Derby*, 14 How. 483. The principle of this case has been followed in an elaborate opinion by Mr. Justice CURTIS, in *The New World v. King*, 16 How. 469, 474, where the old theory of different degrees of negligence defined by the terms, “slight,” “ordinary,” and “gross,” is examined and dissented from. The true theory seems to be, that it makes no difference to the obligation to perform a service well after it is once entered upon whether it is performed gratuitously or not. But it depends chiefly on the circumstances of the case, and the undertaking of the party. If one is permitted to ride in the company’s carriages as a passenger, he is certainly entitled to demand and to expect the same immunity from peril, whether he pay for his seat or not. The undertaking to carry safely is on

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where the plaintiff, being president of another railway, was at the time riding by invitation of the president of defendants' road, in a special train for the accommodation of the officers of the road, and without charge. The collision occurred by another engine and tender coming in the opposite direction upon the same track, in disobedience of orders to keep the track clear. GRIER, J., said: "The confidence induced, by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it. Where carriers undertake to carry persons by the powerful but dangerous agent of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross." But where one accepts and uses a free ticket, having an express * condition printed thereon whereby the holder "assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss of or injury to property," and the passenger is injured by means of a collision between the passenger train and a freight train left standing upon the track, the company, it has been held, is not responsible.¹² Railway companies may stipulate

sufficient consideration if once entered upon, as was held in the familiar case of *Coggs v. Bernard*, Holt, 13. But if the party should obtain consent to ride in some unusual mode for his own special accommodation, he is then only entitled to expect such security as the mode of conveyance might reasonably be expected to afford. But one may be allowed to ride on a passenger train for his own convenience in learning the duty of express agent and not be entitled to the rights of a passenger. *Union Pacific Railroad Co. v. Nichols*, 11 Am. Law Reg. n. s. 32.

¹² *Welles v. New York Central Railroad Co.*, 26 Barb. 641. "Gross negligence" is here defined to be such as implies fraud or bad faith. But we believe such stipulation should not be so construed by the courts as to exempt the company from responsibility for wilful misconduct, or even ordinary neglect, since such a stipulation cannot be supposed to have been made with any such expectation on either part. The most that such a stipulation can fairly be said to import is, that, on the expectation that the carrier will conduct his part of the undertaking with good faith and reasonable care, the holder of such pass will exonerate the giver of it from the extraordinary responsibility of passenger carriers. *Mobile & Ohio Railroad Co. v. Hopkins*, 41 Ala. 438;

for exemption from all responsibility for losses accruing to passengers from the negligence of their agents and servants, unless it arise from fraudulent, wilful, or reckless misconduct on the part of some one employed by the company.¹² Where the injury arose from the gross neglect of the agents and servants of the company, it was held not to come fairly within the risk assumed by the passenger.¹³

5. Hiring a train for an excursion does not excuse the company from liability to the passengers for injuries caused by their servants.¹⁴ Or if the train is under the control of state officers, it will not exonerate the company, or a natural person, if they continue to act as passenger carriers under the state.¹⁵

6. We have sometimes felt that there may be some liability to possible misunderstanding, both ways, in regard to the exact difference between the degree of responsibility of common carriers of goods and passengers. The fact of any difference being recognized leads some to consider it greater than it is, while others make it less. (*d*)

7. It seems to be supposed by some, when it is said that the "utmost" care and diligence is required of carriers of passengers, that if any accident befalls the train upon which they are being transported, which might have been prevented by any degree of human skill or diligence, the carrier is liable for all damages accruing to the passengers. In short, that the carrier assumes all risks of accidental or providential occurrences, pro-

Cleveland, Painesville, & Ashtabula Railroad Co. v. Curran, 19 Ohio St. 1. In the case last cited it was held that the owner of cattle, who is permitted to pass on the railway along with them, and to return by a passenger train without any special charge, is not to be regarded as a gratuitous passenger.

¹² Bissell v. New York Central Railroad Co., 29 Barb. 602; Illinois Central Railroad Co. v. Read, 37 Ill. 484. And the fact that the passenger was riding on a free pass issued on condition that the company should not be held responsible for any negligence of its agents, will not alter the case. *Ib.*

¹⁴ Skinner v. London, Brighton, & South Coast Railroad Co., 5 Exch. 787; s. c. 2 Eng. L. & Eq. 360; Cleveland, Columbus, & Cincinnati Railroad Co. v. Terry, 6 Ohio St. 570. But see Peoria Bridge Association v. Loomis, 20 Ill. 235.

¹⁵ Peters v. Rylands, 20 Penn. St. 497.

(*d*) The company is an insurer only Indiana Railroad Co. v. Boyd, 65 Ind. against risks caused or increased by 526. See *supra*, pl. 1. its own neglect. Grand Rapids &

vided such contingencies might have been resisted or warded off by any degree * of knowledge or activity within the power of man. The result of such a rule will be to render the carrier responsible for all contingencies not absolutely arising from irresistible force, or what is called the *vis major*, such as tempests and hurricanes, and from the public enemy. And this, as we have before shown, brings the rule to the same point which defines the responsibility of carriers of goods.¹⁶

8. The carriers of passengers only contract for their own acts, and for such a degree of watchfulness and diligence as is practicable, short of incurring an expense which would render it altogether impossible to continue the business. Thus, it was said, in one case,¹⁷ that "the care and diligence to be used by both parties are to be measured by the known perils to which passengers are exposed by the particular kind of conveyance used." And in another case in the same state,¹⁸ it is said: "While courts, in announcing the rule governing common carriers of persons, have said, that they must be held to the utmost degree of care, vigilance, and precaution, it must be understood that the rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render it impracticable. Nor does it require the utmost degree of care which the human mind is capable of imagining. Such a rule would require the expenditure of money and the employment of hands so as to render it *perfectly* safe, and would prevent all persons of ordinary prudence from engaging in that kind of business. But the rule does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted."¹⁹

¹⁶ *Supra*, § 167. But see *infra*, § 192 a.

¹⁷ *Chicago, Burlington, & Quincy Railroad Co. v. Hazard*, 26 Ill. 373.

¹⁸ *Tuller v. Talbot*, 28 Ill. 357.

¹⁹ This question is further illustrated in *Bowen v. New York Central Railroad Co.*, 18 N. Y. 408, where it is said that the rule of responsibility of passenger carriers does not require "such particular precaution as it is apparent after the accident might have prevented the injury, but such as would be dictated by the utmost care and prudence of a very cautious person before the accident, and without knowledge that it was about to occur." Mr. Justice JOHNSON here argues against requiring of passenger carriers every possible precaution against accident of which the mind can conjecture, as the rule of responsibility of common carriers of goods, as rendering them responsible for

* 9. As railway passenger carriers are bound to use all reasonable precautions against injury to passengers, it will be natural to

all casualties not produced by irresistible force, such as the act of God or the public enemy. Passenger carriers are not held responsible for the wrongful act of strangers, or of any party not in privity with such carrier. In *Curtis v. Rochester & Syracuse Railroad Co.*, 18 N. Y. 534, the rule is explained more in detail by SELDEN, J. It is there said that where an accident occurs on a passenger train it may be fair to presume that there was negligence or wrong somewhere; but that such presumption does not attach to the company unless or until it appears that the accident was attributable to some defect in the road or equipment, or to some want of proper care and watchfulness on the part of the company or its agents. And the same is said in *Hammack v. White*, 11 C. B. N. s. 587, 594. But it was held in *Dawson v. Manchester, Sheffield, & Lincolnshire Railway Co.*, 5 Law T. N. s. 682; s. c. 7 H. & N. 1037, that if a carriage break down or run off the rail, this will be *prima facie* evidence of negligence. By running off the rail here must be understood, it is apprehended, when it occurs either from defect in the rail or the engine, or in the manner of driving, which will embrace most cases of the kind. In *Pym v. Great Northern Railway Co.*, 2 Fost. & F. 619, it occurred from a defective rail. In *Edwards v. Lord*, 49 Me. 279, where an injury occurred to the plaintiff from the upsetting of a stage-coach, it is said common carriers of passengers are bound to use more than ordinary care; that they must use such care as very cautious persons exercise, and if an accident occur from any cause which any reasonable skill and care on their part might have prevented, they are responsible. *Supra*, notes 5, 6.

The question how far, and under what circumstances, the parties to any contract, express or implied, assume the hazard of providential occurrences, is extensively discussed in some late English cases. In *Taylor v. Caldwell*, 32 Law J. Q. B. 164; s. c. 3 B. & S. 826, the plaintiff had contracted with defendant for the privilege of delivering four lectures, on four different days, but before the stipulated time arrived the buildings where they were to be delivered were destroyed by an accidental fire, and it was held that no recovery could be had. But in the case of *Appleby v. Meyers*, Law Rep. 1 C. P. 615; s. c. 12 Jur. N. s. 500, it was decided, that where the plaintiff undertook to erect certain machinery, and to put the same in condition for use, and to keep the whole in order, under fair wear and tear for two years from the date of completion, and the building wherein the erections were to be made was destroyed by fire, without the fault of the defendant, after the erections were partially made, the plaintiff was entitled to compensation for what he had done, as upon a *quantum meruit*. These cases, and many others in the English books on analogous subjects, such as claims for rent where the buildings are consumed by fire during the term, have professed to go upon the basis of the contract, either express or implied, between the parties. It has been said, that where the party contracts absolutely and unqualifiedly for a certain result, he must take the risk of all accidents, it being regarded as his own folly not to stipulate for such contingencies. But this rule cannot with any propriety

* measure these precautions by those in known use in the same business and the same vicinity or country. So that, if the company fail to adopt the most approved modes of construction and machinery in known use in the business, and injury occur in consequence, they will be responsible, and very justly. As was said in a late English case:²⁰ The company "was bound to use the best precautions in known practical use, to secure the safety of their passengers; but not every possible preventive which the highest scientific skill might have suggested." Hence, if companies see fit to adopt an untried machine or mode of construction,

be applied to implied undertakings, which are but implications of the law from a given state of facts. And, in making such implications, the law will annex all reasonable and just conditions. So that, in regard to the undertakings of carriers of goods and passengers, the law has attached certain conditions to the general undertaking, implied from entering upon the transit, that the thing or the person is to be carried safely through in a reasonable, or in the ordinary time, unless prevented, in the case of carriers of goods, by some invincible obstacle, like the act of God or the public enemy, and in the case of carriers of passengers, by some agency not under the carrier's control, by the exercise of the strictest care and diligence consistent with the successful conduct of the business.

²⁰ *Ford v. London & Southwestern Railway Co.*, 2 Fost. & F. 730, by ERLE, C. J. But in *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312; s. c. 2 Redf. Am. Railw. Cas. 431, where this question is discussed in note, p. 437, it was held, that a ferry company was not bound to adopt a new and improved method, because safer and better than the one used by it, if not requisite to the reasonable safety and convenience of passengers, and especially where the expense was excessive, that of itself being a sufficient reason to decline to adopt it, if inconsistent with the remunerative results of the business. The comments of COLT, J., on the rule requiring common carriers of passengers to adopt the most approved modes to secure safe transportation, and the qualification that the expense of them should not be destructive of the business of the carrier, are worthy of consultation. See *Steinweg v. Erie Railway Co.*, 43 N. Y. 123; *supra*, § 125, note 5; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Smith v. New York & Harlem Railroad Co.*, 19 N. Y. 127; *Brown v. New York Central Railway Co.*, 34 N. Y. 404; *Taylor v. Grand Trunk Railroad Co.*, 48 N. H. 304, where it is said that to allow expense to form an element in the precautions which passenger carriers are bound to adopt, is but giving encouragement to negligence and recklessness. See also *Hanson v. Lancashire & Yorkshire Railway Co.*, 20 W. R. 297, where a passenger was injured by some of the freight getting loose on a goods train, and thus throwing him on the other track, which would have been prevented by using a known precaution in fastening the goods. The court seemed to doubt how far it might be the duty of the company to adopt it. *Supra*, note 5.

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the experiment will be at their own risk ; and if injury occur to passengers thereby, they are responsible.

10. In an important case²¹ appealed from the Province of Canada, and heard before the Judicial Committee of the Privy Council, * it was held that where an injury accrues from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and the evidence may become conclusive from the absence of any proof on the part of the company to rebut it. A railway company in the formation of its line is bound to construct its works in such a manner as to be capable of resisting all extremes of weather which, in the climate through which the line runs, might be expected, though rarely, to occur. But where the company had employed skilful engineers, and used all ordinary precautions in the construction, to have the work properly done, and the giving way of the railway was caused by a storm of unusual magnitude, these facts should be brought to the attention of the jury, and their bearing upon the question of negligence fully explained to them ; but, as the verdict in this case seemed, on the whole, in conformity with the rules of law applicable to the evidence, the judgment thereon was affirmed.

11. Although the happening of damage to a passenger, while carried by common carriers of passengers, is presumptive evidence of negligence on their part, they are not responsible if their neglect did not contribute to the damage.²² And the passenger carrier is at liberty to stipulate for exemptions from responsibility, except for wilful or gross neglect or recklessness.²³

12. Where the perils of the way naturally require special watchfulness on the part of the passengers, it is the duty of the carrier to apprise them of the peril, in order to enable them to take the requisite precaution to leave the carriage, and he is liable for any injury which accrues to the passenger in consequence of such omission.²⁴ And where dangerous operations are going forward

²¹ Great Western Railway Co. v. Fawcett; Same v. Braid, 1 Moore, P. C. 101; 9 Jur. n. s. 339.

²² Tenney v. Pippinger, 1 Phila. 543. See also Thayer v. St. Louis, Alton, & Terre Haute Railroad Co., 22 Ind. 26; *supra*, note 6.

²³ Boswell v. Hudson River Railroad Co., 5 Bosw. 699; see *supra*, note 12.

²⁴ McLean v. Burbank, 11 Minn. 277; ELLSWORTH, J., in Derwort v. Loomer, 21 Conn. 245, 254; Dudley v. Smith, 1 Camp. 167.

upon and above the railway, which may expose the passengers to peril, it is the duty of the company to guard against such perils, although the workmen are not under their control.²⁵

13. One who procures a ticket for a passage in the company's cars is to be regarded as a passenger from the time he purchases his ticket; and it is the duty of the company to provide such person *a safe passage to his seat in the cars, and to guard against all perils which may befall him in the mean time, as far as that is

²⁵ *Daniel v. Metropolitan Railway Co.*, Law Rep. 3 C. P. 216. But this judgment was reversed in the Exchequer Chamber, 3 C. P. 591, on the ground that it should have been submitted to the jury, whether there was any such apparent danger as to have induced a prudent person to take precautions against it. But, as leave was reserved for the judges to make inferences of fact, the judges in the Exchequer Chamber were unanimously of opinion that there was no such obvious danger in the work going forward as should have led the defendants to take precautions against accidents, but they might properly presume that the work would be carried on in a careful manner by those having it in charge. The House of Lords, Law Rep. 5 H. L. 45, affirmed the latter judgment, on the ground that the business was not of so dangerous a character, when properly carried on, as to induce the railway company to take precautions against the occurrence of an accident which might injure its passengers. The primary duty of care rested solely on those having charge of the work. But where a passenger was injured on a steamboat by the falling of a small boat hanging above the deck, it was held evidence of negligence, inasmuch as the carriers of passengers by steamboat were bound to see that such small boats were so fastened that they could not fall from any cause reasonably to be anticipated, including any ordinary carelessness or misconduct of the other passengers. *Simmons v. New Bedford, Vineyard, & Nantucket Steamboat Co.*, 97 Mass. 361. And it has been held that, where railway companies carry passengers and accept fare in the caboose car attached to the freight trains, they are responsible to the same extent as when carrying in their regular passenger trains. *Edgerton v. New York & Harlem Railroad Co.*, 39 N. Y. 227. And in *Dunn v. Grand Trunk Railway Co.*, 10 Am. Law Reg. n. s. 615; s. c. 58 Me. 187, it was held that where one was allowed to pass on a freight train by the conductor, and paid the fare of a first-class passenger, although contrary to the rules of the company, the corporation incurred "the same liability for his safety as if he were in their regular passenger train." See s. c. 2 Redf. Am. Railw. Cas. 490. And in *Eaton v. Delaware, Lackawanna, & Western Railroad Co.*, 1 Am. Law Rec. 121, the plaintiff was invited to ride in the caboose car of a coal train by the conductor, without being informed that the defendants did not carry passengers in that mode, and the company was held responsible to the same extent as if he went on a passenger train, although he paid no fare. "Extraordinary care," held equivalent to the highest degree of care. *Toledo, Wabash, & Western Railway Co. v. Baddeley*, 54 Ill. 19.

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practicable, both by general regulations and special directions, at the time when it becomes necessary to cross the railway track, in order to take such seat.²⁶ (e)

14. It is the duty of passenger carriers to exclude from their carriages all lawless and disorderly persons, and, where such persons come upon their carriages, in spite of all efforts on their part to stop the train and rally all force in their power and exclude the intruders²⁷ — and probably, after failing in that, either to discontinue that trip, or give the passengers an opportunity to leave the carriages, if they choose, before the train proceeds. If this is not done, the carrier will be responsible for the acts of the intruders.

²⁶ *Warren v. Fitchburg Railroad Co.*, 8 Allen, 227. In the English and continental railways, no passenger is allowed to cross the tracks, except on a bridge above, or a tunnel below the line. But it is, nevertheless, constantly done there, to save time; but always at the risk of the passenger. Some such arrangement is requisite, certainly, for perfect safety, and where none such exists, it is clearly the duty of the company to caution passengers when trains are due.

²⁷ *Pittsburgh, Fort Wayne, & Chicago Railroad Co. v. Hinds*, 7 Am. Law Reg. n. s. 14; s. c. 53 Penn. St. 512.

(e) And if the employés of the company direct him to enter the car at some place other than the platform or place provided for such purpose, they are bound to use the utmost care to prevent injury. *Allender v. Chicago, Rock Island, & Pacific Railroad Co.*, 43 Iowa, 276. See *Hartwig v. Chicago & Northwestern Railway Co.*, 49 Wis. 358; *Carpenter v. Boston & Albany Railroad Co.*, 97 N. Y. 494; *Hamilton v. Texas & Pacific Railroad Co.*, 21 Am. & Eng. Railw. Cas. 336. The purchase of a ticket is not essential to constitute one a passenger entitled to such protection. That one has entered the station waiting-room and informed the master of his desire to go, &c., may suffice. *Allender v. Chicago, Rock Island, & Pacific Railroad Co.*, 37 Iowa, 264. One in the employ of the company painting

bridges, depots, tanks, &c., and so travelling from place to place on a small steam car like a hand-car, is not a passenger, entitled to compensation in case of injury. *McQueen v. Central Branch Union Pacific Railroad Co.*, 15 Am. & Eng. Railw. Cas. 226. But mail agents are to be deemed passengers. *New York, Lake Erie, & Western Railroad Co. v. Seybolt*, 95 N. Y. 562. So are ladies who while waiting are permitted, the waiting-room being disturbed in the process of cleaning, to enter a car standing on the track. *Shannon v. Boston & Albany Railroad Co.*, 23 Am. & Eng. Railw. Cas. 511. And so is any one lawfully on the train whether he pays or rides free by invitation. *Prince v. International & Great Northern Railroad Co.*, 21 Am. & Eng. Railw. Cas. 152.

15. A railway company is bound to fence its station so that the public may not be misled, by seeing a place unfenced, into passing by a dangerous way, being the shortest to the station.²⁸ (f)

16. A case of considerable interest has recently arisen in the Circuit Court of the United States, in the Connecticut District, before SHIPMAN, J.²⁹ The plaintiff was very seriously injured,

²⁸ *Burgess v. Great Western Railway Co.*, 6 C. B. N. s. 923.

²⁹ *Flint v. Norwich & New York Transportation Co.*, 34 Conn. 554.

(f) And bound to exercise due care for passengers waiting for trains. *Allender v. Chicago, Rock Island, & Pacific Railroad Co.*, 43 Iowa, 276; *Bennett v. Railroad Co.*, 102 U. S. 577. Thus, if a passenger waiting on a platform is struck and injured by mail thrown by a postal clerk from a passing train, according to a custom known to the company, the company will be liable. *Snow v. Fitchburg Railroad Co.*, 136 Mass. 552. But the company will not be liable to a female passenger for profane and obscene language and indecent exposure of person by a mere intruder at a station. *Batton v. South & North Alabama Railroad Co.*, 23 Am. & Eng. Railw. Cas. 514. The company is also bound to provide passengers a safe passage to and from trains. *Baltimore & Ohio Railroad Co. v. State*, 60 Md. 449; *Brassell v. New York Central & Hudson River Railroad Co.*, 84 N. Y. 241. And to give proper directions therefor. *Allender v. Chicago, Rock Island, & Pacific Railroad Co.*, *supra*; *Chance v. St. Louis, Iron Mountain, & Southern Railway Co.*, 10 Mo. Ap. 351. Whether it is the duty of the servant of the company to assist a passenger in getting aboard, must depend on circumstances. *Bennett v. Railroad Co.*, 102 U. S. 577. And though not necessarily bound to erect a foot-bridge over its line from one platform to the other, the absence of

it will throw upon the company a greater duty to provide for public safety otherwise. *Thomson v. North British Railway Co.*, 4 Scotch Ses. Cas. 115. It is the duty of a company carrying passengers on long journeys to provide easy modes and reasonable time for obtaining refreshments. This would include proper ways of egress and ingress at eating stations, and properly lighted ways to and from the trains, as well as correct information as to the position of the train, where it has been moved in the passenger's absence. *Peniston v. Chicago, St. Louis, & New Orleans Railroad Co.*, 34 La. An. 777. The company is bound to provide safe and sufficient platforms. *St. Louis, Iron Mountain, & Southern Railroad Co. v. Cantrell*, 37 Ark. 519. Not so narrow that a passenger standing thereon may be injured by a passing train. *Chicago & Alton Railroad Co. v. Wilson*, 63 Ill. 167. But the company is not bound to provide a platform on more than one side of the train. *Michigan Central Railroad Co. v. Coleman*, 28 Mich. 440. See *Dobiecki v. Sharp*, 8 Am. & Eng. Railw. Cas. 485. And see as to stairs *Beard v. Connecticut & Passumpsic Rivers Railroad Co.*, 48 Vt. 101. As to snow and ice on platforms, see *Weston v. New York Elevated Railroad Co.*, 73 N. Y. 595.

while a passenger on board one of the defendants' boats, by reason of the discharge of a musket by being dropped on the deck of the boat by one soldier engaged in a struggle with another soldier, such soldiers, with others, being carried by the defendants, at the same time with other passengers who were civilians, the plaintiff being of the latter class. It was held, that passenger carriers for hire are bound to exercise the utmost vigilance and care in maintaining order, and guarding those they transport against violence, from whatever source arising, which might be reasonably anticipated or naturally expected to occur, in view of the circumstances and of the number and character of the persons on board. Under this * rule the carrier is bound to protect one passenger from the violence of another. And it was further held, that, in the present case the carrier was not excused by showing that he was compelled by the government to receive the soldiers on board, and that they were in charge of officers; clearly not when he afterwards voluntarily received the plaintiff as a passenger, without notice to him of the enforced presence of the soldiers.²⁰

²⁰ As a general rule, the government can compel a carrier to transport soldiers and munitions of war only when it assumes the entire control of his means of transportation, and supplies a full freight. Military and civil passenger transportation cannot be properly carried on at the same time and in the same vessels.

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SECTION I a.

Railway Management and Responsibility.

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| <ol style="list-style-type: none"> 1. Distinction between the responsibility of common carriers and that of passenger carriers, rather formal than substantial. 2. Passenger carriers bound to furnish themselves with every security known to the business, or take the risk of a deficiency. 3. People in foreign countries cannot comprehend our rashness in passenger transportation by railway. 4. Comparison of precautions adopted abroad with those used here. Courts | <p style="margin-left: 20px;">should be more stringent in their demands respecting precautions.</p> <ol style="list-style-type: none"> 5. Those who voluntarily submit to destruction, as well as those who perpetrate it, should be punished. 6. Instinctive sentiments of juries in holding railway passenger carriers responsible for all injury to passengers, wise and just. 7. It is not safe to affirm that passenger carriers are bound to safe delivery at destination. But the rule, properly understood and justly applied, falls scarcely short of this. |
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§ 192 a. 1. There is one subject connected with railway management and responsibility to which we desire to devote some special consideration here, and to guard against being misunderstood. We refer to the exact limits of responsibility, and the precise measure of care and diligence which the law imposes upon, or requires of passenger carriers by railway. (a) We have been so long accustomed to define this diligence and responsibility by reference to, and comparison with, that of common carriers of goods, and to consider the former as of an inferior degree as compared with the latter, that it seems to us the profession are not always fully sensible of the real extent of the responsibility which the law imposes upon * railway passenger carriers. The more we have studied and attempted to define this distinction between the degree of responsibility imposed upon railway passenger carriers and common carriers of goods, the more clearly we have felt that the difference is rather formal than substantial. The cases all agree that passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and that, if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible, as well in the case of passengers as of

(a) See *supra*, § 191.

goods. In the latter case it is said that the carrier is absolutely bound to safe delivery, and not in the former. But in the case of goods, the carrier is excused for loss or damage occurring from the misconduct of the owner, either in package, or storage, or stowage, or in regard to any other thing, when he assumes to act or direct on his own responsibility. And he is not responsible for damage occurring from inevitable accident or irresistible force, or, as it was formerly said, for those results which follow from the act of God or the king's enemies.

2. And when we admit all these excuses for passenger carriers, there remains very little or nothing more which the law recognizes as an adequate excuse for any damage occurring during the transportation. Some are accustomed to suppose that damage occurring from the want of more perfect appliances for passenger transportation, is not chargeable to the carrier; and are not fully aware that this precise point has been decided. It is, indeed, not always easy to determine precisely the effect of any particular defect existing in the appliances in actual use upon any particular line of railway where damage occurs, and what might have been the result if the appliances had been as perfect as possible. And so, too, of the management of the particular train at the time the injury occurred, it is not always a point upon which skilled and experienced men agree, what might have been done more or different from what was done to insure safety. And there are many that suppose the passenger assumes all the risks resulting from such deficiencies as are apparent to all, and therefore presumably known to him. As, for instance, when it can be shown with reasonable certainty, that if there had been a double track no damage could have occurred at the time, or in the mode in which it did, the opinion is not uncommon, * we believe, that this will not fix the responsibility of the carrier; but we consider this opinion to be altogether erroneous. For if this view can be entertained, and carried to its logical results, it will go a long way towards excusing passenger carriers for all damage which is not the result of some degree of negligence at the very time it occurs.

3. For if railway companies may excuse themselves from responsibility for damage to passengers, by proving the most obvious and criminal defects in the construction and equipment of their roads, or in the use of the commonest precautions to insure

safety, there will be no security for railway passengers. We must either eschew railway travelling altogether, or else understand that, in entering a railway carriage, we take our lives in our own hands. It would almost seem that the railway managers in our country have adopted some such theory of absolute immunity from all responsibility, or they would not dare expose their passengers to such awful perils. It is but just to say, that the barbarous and inhuman sacrifice of such multitudes as has occurred, in repeated instances, in our country during the last few years, presents a problem which it is quite impossible for people in other countries to solve, and for which it is not easy for the most friendly disposed to invent any sufficient apology or excuse.

4. And when we reflect how these things are managed in England, by means of actual signals from station to station, showing a clear track before any train is allowed to pass; and especially in some of the continental countries, like Austria and Bavaria, and other German States, and elsewhere, where electric telegraphic stations are maintained at very short intervals, with operators, whose sole employment is to know that all is right on the advancing line, and to bow the trains along by the graceful touch of the hat as they pass, — when we pass along these lines, with double track throughout, and a perfect road-bed and superstructure and equipment, and all these telegraphic precautions, in addition, we cannot but feel surprised that public opinion in America will tolerate such terrible destruction of life, such horrid mangle of bodies and limbs, and literal burning alive, as has occurred here within the last few years. One feels the inexcusable character of these outrages more keenly while surrounded by those who are so incapable of comprehending how it is possible for them to occur. We hope the time is not very remote when our courts will be able * to place themselves upon the proper theory on this subject, that any person, natural or corporate, who undertakes the transportation of passengers by the dangerous element of steam, and with the great speed of railway trains, must be held responsible for the use of every precaution which any known skill or experience has yet been able to devise, and that passengers are not bound to judge for themselves how many of these precautions it is safe to forego.

5. It is no excuse that the public desire cheap and rapid travelling in all directions and everywhere. We do not allow every one,

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at will, to build railways, and to manage them in his own way ; and if the government professes to control these matters at all, it is bound to do it effectually. And, if it were made a matter of national supervision, it would be much easier to do so, and thus prevent these daily tragedies, which we have almost ceased to regard in consequence of their frequency. We do not allow monomaniacs or brigands to commit suicide or murder without interference, because it is their pleasure or their interest to do so ; and we see no good reason why railway passengers or railway managers, should be allowed to roast a hecatomb in human sacrifice, because it seems convenient or desirable to the one or the other class concerned in the immolation, or because the one class demands and the other consents to use a mode of passenger transportation which inevitably produces these results.

6. The truth is, that common juries, with their higher instincts of justice, have always, in our country, been accustomed to view the matter of railway responsibility for passenger transportation in the light of higher and fuller responsibility than either the courts or the profession. It is not uncommon to hear it objected, in our country, against the reason or justice of jury trials, that the result is always the same in all actions for injuries to passengers on railways ; the companies are sure to be cast in the actions, and this seems to be regarded as an unanswerable reproach. But when we reflect how much more might be done, in all such cases, to secure perfect safety and exemption from injury, and how much more really is done, both in Great Britain and on the continent of Europe, we can only conclude that the common-sense instincts of jurors have raised them to a higher plane of wisdom and justice than that which the courts or the profession have yet attained.

7. We do not feel prepared to say that a railway company * which undertakes the transportation of passengers, is absolutely bound to safe delivery, the same as common carriers of goods, inevitable accident, irresistible force, and the misconduct of the party only excepted ; but we must confess in all sincerity, that the distinction which we have all taken so much labor and pains to maintain between these two classes of carriers, is rather shadowy and unsubstantial ; and it seems to us that since the introduction of railways, we are able to comprehend more fully that the distinction is really without much just foundation. If no railway com-

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pany is to be excused for any injury occurring to its passengers until the company has done all that it was in its power to do to guard against the occurrence of injuries of that character, it will be a long time before we shall hear the repetition of the charge as a reproach, that juries always find against railway companies in such cases. They will be expected to find so. And, for one, we shall expect that all the excepted cases will soon be reduced to those which exist in the case of common carriers of goods. For if railway passenger carriers are bound to do all for the security of their passengers which human care, skill, and diligence can effect, and if this is to be measured by what is known and done in like cases throughout the world, and the passenger is not presumed to exercise any judgment upon the subject, unless or until he consents, in terms, expressly to assume some portion of the risk himself, or constructively does so by violating the regulations of the company, as by needlessly exposing his person, we do not see but the carrier must show, in order to excuse an injury to a passenger, that it resulted from inevitable accident or irresistible force, or was the fault of the passenger. If the carrier is bound to do all that it was possible to have done to prevent the occurrence of injury to his passengers, and really performs his duty, and injury still occurs, it must of necessity be an occurrence in the nature of things inevitable or irresistible.

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*SECTION II.

Liability where both Parties are in Fault.

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| <ol style="list-style-type: none"> 1. Carrier not liable unless itself in fault. 2. Nor where passenger's fault contributes directly to injury. <ol style="list-style-type: none"> n. (a)-(c). Contributory negligence, what constitutes. Negligence of children. Choice between hazards. n. (d). Whether passenger may recover where his negligence is slight and that of the carrier the proximate cause, <i>quære</i>. 3. Carrier liable for wilful misconduct, or misconduct the consequences of which the plaintiff could not escape. 4. Passenger may recover for gross neglect of carrier, although in fault himself. 5. But not where he knew his neglect would expose him to injury. 6. May recover although riding in baggage car. 7. Company do not owe the same care to trespassers. 8. Passenger may recover, when, although out of his place on the train. 9. Passenger affected by negligence of those who carry him. 10. Fault on one side will not excuse the other party, if he can avoid committing the injury. 11. Negligence to be determined by the jury, where evidence conflicts. 12. Passenger must be lawfully in the place where injured. 13. Passenger bound to conform to regulations of carrier, and directions of conductors. 14. Precautions to be used by passengers. | <ol style="list-style-type: none"> 15. Proof of contributory negligence. Burden on the defendant. 16. Presumption of negligence being established, carrier must show that no reasonable precaution would have prevented the injury. 17. Person crossing a railway track must look out for trains, or he cannot recover for an injury. 18. Rushing across a track when a train is approaching precludes recovery for injury. 19. One cannot recover for an injury the result of heedlessness. 20. Degree of caution required of passenger carriers. 21. English courts recognize no difference between negligence and gross negligence. <ol style="list-style-type: none"> n (k). So in several of the states. 22. Negligence, to preclude recovery, must directly tend to produce the injury. 23. Ordinarily negligence must be proved, and also that but for such negligence the injury would not have occurred. 24. Passenger carriers must provide suitable accommodations for all passengers. 25. Passengers must conform to the usages and rules of the company, or fail to recover. 26. Passenger injured by the fault of carrier's employés, may recover, unless the injury is by his own invitation. 27. Passengers entitled to seasonable notice of change of cars, and time to make it. |
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·§ 193. 1. To the liability of a railway company, as a passenger carrier, two things are requisite,—that the company shall be

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guilty * of some negligence (*a*) or omission which, mediately or immediately, produced or enhanced the injury ; and that the passenger should not have been guilty of any want of ordinary care and prudence which directly contributed to the injury ; since no one can recover for an injury of which his own negligence was in whole, or in part, the proximate cause.¹ (*b*).

¹ Robinson v. Cone, 22 Vt. 213; Butterfield v. Forrester, 11 East, 60; Simpson v. Hand, 6 Whart. 311; Rathbun v. Payne, 19 Wend. 399; Barnes v. Cole, 21 Wend. 183; Hartfield v. Roper, 21 Wend. 615. In this last case the rule was carried to the extreme verge in denying the recovery, and it seems at variance with the more recent cases on the subject. See Robinson v. Cone, 22 Vt. 213; and Lynch v. Nurdin, *infra*, also Birge v. Gardiner, 19 Conn. 507; Collins v. Albany & Schenectady Railroad Co., 12 Barb. 492. In the case of Martin v. Great Northern Railway Co., 16 C. B. 179; s. c. 30 Eng. L. & Eq. 473, a query is made whether, if a passenger is hurt in the station of a railway company, after being booked as a passenger, and while going to the train, through the defective lighting of the station, he is precluded from a recovery by reason of his own negligence having contributed to the injury, a distinction being attempted between negligence which is a violation of contract, and that which is only a violation of the general duty to use your own so as not needlessly to injure others. This is alluded to, not as having marked out any intelligible ground of distinction, but as another indication of a disposition to restrain the universal application of the former rule, that the slightest possible negligence on the part of the plaintiff will, in all cases, prevent a recovery. It is no excuse for the carrier's negligence that the negligence of a third party, no way connected with the carrier or the passenger, also contributed to the injury. Eaton v. Boston & Lowell Railroad Co., 11 Allen, 500. See Ohio & Mississippi Railroad Co. v. Gullett, 15 Ind. 487, where in a suit against a railway company for injuries received while standing on the platform of one of the company's stations, by the falling of wood from a passing train, alleged to have been carelessly loaded, run, and managed, it is held, that if the injury resulted from any negligence on the part of the plaintiff, he cannot recover. See also Spencer v. Utica & Schenectady Railroad Co., 5 Barb. 337; Brand v. Troy & Schenectady Railroad Co., 8 Barb. 368; Richardson v. Wilmington & Manchester Railroad Co., 8 Rich. 120. This was an action by the master for the killing of his slave while asleep on the track. The court held that the negligence of the slave would prevent the recovery. Galena & Chicago Railroad Co. v. Fay, 16 Ill. 548. In Fairchild v. California Stage Co., 13 Cal. 599, where an injury occurred to a person travelling on a stage-coach, it is held that in case of injury, the presumption is, *prima facie*, that it occurred by the negligence of the coachman.

(*a*) Negligence is defined as want of care according to the circumstances. Philadelphia, Wilmington, & Baltimore Railroad Co. v. Stinger, 78 Penn. St. 219; Marcott v. Marquette, Houghton, & Ontonagon Railroad Co., 47 Mich. 1.

(*b*) Contributory negligence, to pre-

* 2. But one is only required to exercise such care as prudent persons under his particular circumstances might reasonably be expected to exercise. Hence a very young child, or perhaps one deprived of some of the senses, or who was laboring under mental alienation, or a very timid or feeble person, would not be precluded from recovering for the negligence of others, when persons of more strength or courage or capacity might have escaped its consequences.² (c) And although the plaintiff's * misconduct

² *Robinson v. Cone*, 22 Vt. 213; *Lynch v. Nurdin*, 1 Q. B. 29. The misconduct of one assuming the charge of a child of tender years, but to whom it had not been intrusted, will not preclude a recovery on its part for the negligence of the company. *North Pennsylvania Railroad Co. v. Mahoney*, 57 Penn. St. 187. See *Winters v. Hannibal & St. Joseph Railroad Co.*, 39 Mo. 468. And it has often been held that the negligence of the parent in suffering his child to wander from home, and thus become exposed to peril about a railway station, will not excuse the company for carelessly leaving dangerous places exposed, when they know children are liable to fall into them; and if a child suffer injury in that mode he may recover damages of the company. *Stout v. Sioux City & Pacific Railroad Co.*, 11 Am. Law Reg. n. s. 226. See

clude recovery, must be such as to amount to a want of ordinary or reasonable care. *Mackoy v. Missouri Pacific Railway Co.*, 18 Fed. Rep. 286; *Houston & Texas Central Railway Co. v. Gorbett*, 49 Tex. 573. Where one in great danger makes a choice between two hazards, and is thereby injured, the company by whose negligence he is put in jeopardy, will not be relieved from liability by the fact that if he had chosen the other hazard he would have escaped injury, if the choice is such as a person of ordinary care and prudence might make in like circumstances. *Mark v. St. Paul, Minneapolis, & Manitoba Railway Co.*, 12 Am. & Eng. Railw. Cas. 86; *Haff v. Minneapolis & St. Louis Railway Co.*, 14 Fed. Rep. 558; *Moore v. Central Railroad Co.*, 47 Iowa, 688; *Schultz v. Chicago & Northwestern Railway Co.*, 44 Wis. 638. And see *Wilson v. Northern Pacific Railroad Co.*, 26 Minn. 278; *Mobile & Montgomery Railroad*

Co. v. Ashcroft, 48 Ala. 15; *Iron Railroad Co. v. Mowery*, 36 Ohio St. 418. Antecedent negligence of the passenger will constitute no defence. *Wood v. Lake Shore & Michigan Southern Railway Co.*, 49 Mich. 370.

(c) Negligence cannot be imputed to children not of sufficient capacity to understand the danger and guard against it. *Pennsylvania Railroad Co. v. James*, 81½ Penn. St. 194; *Cleveland, Columbus, & Cincinnati, & Indianapolis Railroad Co. v. Manson*, 30 Ohio St. 451; *Government Street Railroad Co. v. Hanlon*, 53 Ala. 70. Thus, it has been held that a child under three years of age cannot be guilty of contributory negligence. *Norfolk & Petersburg Railroad Co. v. Ormsby*, 27 Grat. 455. So of a child under six. *Bay Shore Railroad Co. v. Harris*, 67 Ala. 6. The contributory negligence of the parent, however, is, it is held, a defence, even when the child is the plaintiff. *Toledo, Wabash, & Western*

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may have contributed remotely to the injury, if the defendant's misconduct was the immediate cause of it, (d) and * with the also *Bronson v. Southbury*, 37 Conn. 199; *Bellefontaine & Indiana Railroad Co. v. Snyder*, 18 Ohio St. 399. In *Lynch v. Smith*, 104 Mass. 52, it was held

Railway Co. v. Miller, 76 Ill. 278; *Hathaway v. Toledo, Wabash, & Western Railway Co.* 46 Ind. 25. But *contra*, though admitted to be so where the parent sues for loss of services. *Bellefontaine Railway Co. v. Snyder*, 24 Ohio St. 670; *Moore v. Metropolitan Railroad Co.*, 2 Mackey, 437. And see *contra*, *Norfolk & Petersburg Railroad Co. v. Ormsby*, 27 Grat. 455. As to the degree of care to be exercised by children, see further *Dowling v. New York Central & Hudson River Railroad Co.*, 90 N. Y. 670; *Byrne v. New York Central & Hudson River Railroad Co.*, 83 N. Y. 620; *Mobile & Montgomery Railway Co. v. Crenshaw*, 65 Ala. 566; *Chicago & Alton Railroad Co. v. Murray*, 71 Ill. 601; *McMillan v. Burlington & Missouri River Railroad Co.*, 46 Iowa, 231. In *Indianapolis, Peru, & Chicago Railway Co. v. Pitzer*, 25 Am. & Eng. Railw. Cas. 313, it was held that where a child seven years old goes aboard train of his own motion, it is negligence to put him off at next station without word to any one. It cannot be said as matter of law that women are held to the exercise of less care than men. *Hassenger v. Michigan Central Railroad Co.*, 48 Mich. 205. As to the degree of care to be exercised over children, see *Pittsburg, Allegheny, & Manchester Passenger Railway Co. v. Pearson*, 29 Leg. Int. 372.

(d) Where the negligence of the company is the proximate cause and that of the plaintiff only a remote cause, contributory negligence it seems is no defence. *Meyers v. Chicago*,

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Rock Island, & Pacific Railroad Co., 59 Mo. 223; *Thirteenth & Fifteenth Street Passenger Railway Co. v. Boudrou*, 92 Penn. St. 475; *Meeks v. Southern Pacific Railroad Co.*, 56 Cal. 513; *Ricker v. Freeman*, 50 N. H. 420. And the courts of Illinois have several times held that the plaintiff may recover, notwithstanding his negligence, where it is slight and that of the company is great. *Chicago & Northwestern Railway Co. v. Dimick*, 96 Ill. 42; *Stratton v. Central City Horse Railway Co.*, 95 Ill. 25, and cases there referred to. And see *Chicago & Alton Railroad Co. v. Bonifield*, 104 Ill. 223. But are these cases really contrary to the usual rule? Do they more than say that in reality the negligence of the injured person did not contribute in any reasonable sense of the term to his injury?

Whether it is negligence to ride with one's arm on the window sill depends on circumstances. *Farlow v. Kelly*, 11 Am. & Eng. Railw. Cas. 104. See *Dale v. Delaware, Lackawanna, & Western Railroad Co.*, 73 N. Y. 468. But for a passenger of mature years to ride with his arm out of the car window is negligence. *Pittsburg & Connellsville Railroad Co. v. Andrews*, 39 Md. 329.

Intoxication is not *per se* such negligence as will preclude a recovery. *Holmes v. Oregon & California Railway Co.*, 6 Sawyer, 262. But see *Weeks v. New Orleans & Carrollton Railroad Co.*, 32 La. An. 615, where it is held that the company will not be liable if the intoxication has contributed to the injury.

exercise of prudence he might have prevented it, he is not excused.³(e) And there is no question that the special circum-

to be a question of fact whether a child, between four and five years of age, was of sufficient capacity to go to school safely alone across a street traversed by a street railway, and it was further declared, that even if it were found to be imprudent for the parent to suffer such a child to be thus exposed, the child might nevertheless recover for an injury by the negligence of another, provided he exercised care reasonably according to the circumstances of the case. The general proposition that plaintiff's negligence contributing directly to the injury will preclude a recovery, is maintained in a very great number of cases. *Vanderplank v. Miller*, 1 Moody & M. 169; *Luxford v. Large*, 5 Car. & P. 421; *Sill v. Brown*, 9 Car. & P. 601; *Harlow v. Humiston*, 6 Cow. 189, 191. In *Sill v. Brown*, which is regarded as an important and somewhat leading case on this point, the defendant was in fault in carrying the anchor of his brig in a position contrary to the rules of navigation, without which the collision complained of would not have occurred. But the plaintiff was also in fault in departing from the rules, and thereby bringing his barge into the

³ *Davies v. Mann*, 10 M. & W. 546; *Illidge v. Goodwin*, 5 Car. & P. 190; *Chicago & Alton Railroad Co. v. Pondrom*, 51 Ill. 333. See also *Augusta & Savannah Railroad Co. v. McElmurry*, 24 Ga. 75. But where the plaintiff undertook to pass across a freight train standing between the station and the passenger train, and just ready to start, without informing those having charge of the former train, and was so injured that he died in consequence of the movement of the freight train, it was held that the company was not liable. But it was suggested that such an act in the case of a child or person of less than ordinary discretion, might not have precluded the recovery against the company. *Chicago, Burlington, & Quincy Railroad Co. v. Dewey*, 26 Ill. 255. So, too, the plaintiff cannot recover for an injury resulting from the negligence of the defendant, if notwithstanding such negligence he might have avoided the injury by the exercise of care and prudence on his part, or if his want of care and prudence, or that of the party injured, in any way contributed directly to the injury. *State v. Baltimore & Ohio Railroad Co.*, 24 Md. 84.

(e) *Meyers v. Chicago, Rock Island, & Pacific Railroad Co.*, 59 Mo. 223; *Richmond & Danville Railroad Co.*, 31 Grat. 812; *Chicago & Alton Railroad Co. v. Becker*, 76 Ill. 25; *Tanner v. Louisville & Nashville Railroad Co.*, 60 Ala. 621. *A fortiori* if the injury was inflicted wantonly or intentionally. *Cook v. Central Railroad & Banking Co.*, 67 Ala. 533. So where the negligence of the injured person is seen by the employers of the company in time to prevent injury therefrom, and they nevertheless fail to exercise the necessary care. *Yarnall v. St. Louis, Kansas City, & Northern Railway Co.*, 75 Mo. 575; *Little Rock & Ft. Smith Railway Co. v. Parkhurst*, 36 Ark. 371; *Healey v. Dry Dock Railroad Co.*, 46 N. Y. Superior Ct. 473; *Chicago, Burlington, & Quincy Railroad Co. v. Johnson*, 103 Ill. 512.

stances of a case may require more than ordinary care on the part of the defendants, a railway company: as where freight cars

position where she was struck by defendant's brig. And the parties being thus about equally in fault, so that the damage could not have occurred if either had conformed to the rules, it was held that the plaintiff could not recover; and that by parity of reasoning if the defendant was guilty of such fault that the damage was inevitable, he should be held responsible to the extent that he clearly caused the damages, without regard to the defendant's fault. But it is questionable how far the decisions will justify this rule. The courts seem to be slow to bring the rule of responsibility, where both parties are in fault, to this clear test of principle. It is easier to say, that if the plaintiff is in fault he cannot recover, than to define the exact extent of the rule stated.

But it seems well settled that the mere fact that both parties were in fault at the time the injury occurred will not always preclude a recovery. *Raisin v. Mitchell*, 9 Car. & P. 613; *Smith v. Dobson*, 3 Man. & G. 59. In *Lynch v. Nurdin*, 1 Q. B. 29, DENMAN, C. J., says, "Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation." *Beers v. Housatonic Railroad Co.*, 19 Conn. 566; *Neal v. Gillett*, 23 Conn. 437. In a trial in Connecticut before Mr. Justice SKYMOUR, a case of some interest was submitted to a jury. The facts were, that the plaintiff, a child two years old, who sued by guardian, while on the track of the Norwich & Worcester Railroad, was run over by a train, and had a leg and hand amputated in consequence. The learned judge left the question of negligence in both parties to the jury, saying he did not think negligence could fairly be imputed to so young a child, and that the negligence of the parents, if any, would not hinder plaintiff's recovery, if the defendant, after discovering the plaintiff on the track, might have prevented the injury, which is certainly the more common test of liability in similar cases. The jury gave the plaintiff a verdict for \$1,800. *Ranch v. Lloyd*, 31 Penn. St. 358; *supra*, § 133, pl. 7, 10. In *Daley v. Norwich & Worcester Railroad Co.*, 26 Conn. 591, Mr. Justice ELLSWORTH reviews the cases, and sustains the doctrine of the text to the fullest extent. *Pennsylvania Railroad Co. v. Kelly*, 31 Penn. St. 372. And the fact that the person injured was trespassing at the time is no excuse, unless he thereby invited the act, or his negligent conduct contributed to it. *Daley v. Norwich & Worcester Railroad Co.*, *supra*; *Brown v. Lynn*, 31 Penn. St. 510; *Cleveland, Columbus, & Cincinnati Railroad Co. v. Terry*, 8 Ohio St. 570. But in *Singleton v. Eastern Counties Railway Co.*, 7 C. B. N. S. 287, it was held that where a child three and a half years old strayed on a railway, and had its leg cut off by a passing train, in the absence of all evidence to show that the child came on the track through the negligence or default of the company, it was not responsible. But the court disclaims all purpose of qualifying the former cases. And in *Waite v. Northeastern Railway Co.*, Ellis, B., & E. 719, where a child too young to take care of itself, and being under the charge of another, who took tickets for both, while waiting for the train was injured by an accident,

were detached from a train and sent with a rush round a curve, upon an open space of ground, where children and others were known to be constantly passing, with no one upon such cars to control them,⁴ and a young child thereby seriously injured.

*3. So, too, where there is intentional wrong on the part of the defendant, he is liable, notwithstanding negligence on the part of the plaintiff.⁵ And if the defendant is guilty of a degree of negligence from which the plaintiff, with the exercise of ordi-

which was caused by the joint negligence of the one who had the child in charge and the company's servants, it was held that the child could not maintain an action against the company. This was in the Exchequer Chamber, and the facts were that where a child five years old in the care of his grandmother at a railway station, was injured by a goods train in crossing the track to the passenger carriages, the jury having found negligence both in the servants of the company and in the grandmother, it was held that the plaintiff was so identified with his grandmother, that by reason of her negligence an action in his name could not be maintained against the company. 5 Jur. n. s. 936. See also *Hughes v. Macfie*, 2 H. & C. 744; s. c. 10 Jur. n. s. 682, where a similar rule is declared as in *Singleton v. Eastern Counties Railway Co.*, *supra*.

In *Oldfield v. New York & Harlem Railroad Co.*, 3 E. D. Smith, 103, it is held, that negligence is not presumed as matter of law from a child six or seven years of age being unattended in the streets of a city. Whether permission to the child to go into the streets in that way is negligence, is for the jury to determine from the circumstances of each case. The company will be held responsible for any unsafe arrangement in getting over the track, as for an unsafe bridge. *Longmore v. Great Western Railway Co.*, 19 C. B. n. s. 183; *Nicholson v. Lancashire & Yorkshire Railway Co.*, 3 H. & C. 534. So where the train is longer than the platform, and a passenger is injured by jumping to the ground. *Foy v. London, Brighton, & South Coast Railway Co.*, 18 C. B. n. s. 225. So also where there was a swing gate at a level crossing, and no one to tend it, one hundred trains passing daily. *Bilbee v. Same*, 18 C. B. n. s. 584; *Stubley v. London & Northwestern Railway Co.*, 4 H. & C. 83; s. c. 11 Jur. n. s. 954; *Stapley v. London, Brighton, & South Coast Railway Co.*, Law Rep. 1 Exch. 13; *Wyatt v. Great Western Railway Co.*, 6 B. & S. 709. The rule in Massachusetts is that the negligence of those who have the charge of children or others laboring under physical or mental inability to exercise caution on their own behalf, will affect their right of action the same as in other cases. *Holly v. Boston Gas Light Co.*, 8 Gray, 123; *Wright v. Malden & Melrose Railroad Co.*, 4 Allen, 283.

⁴ *Kay v. Philadelphia Railroad Co.*, 27 Phila. 205.

⁵ *Brownell v. Flagler*, 5 Hill, N. Y. 282. This is the case of a drover knowingly driving off a lamb which had strayed into his drove, and he was held liable, although the plaintiff was first in fault, and defendant, in selling his drove, did not take pay for this lamb.

nary care, cannot escape, he may recover, although there was want of prudence on his part.⁶

4. And, in many cases, the plaintiff has been allowed to recover for the gross negligence of the defendant, notwithstanding he was, at the time, a trespasser upon the defendant's rights.⁷

⁶ *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244. In a late case in Georgia, *Macon & Western Railroad Co. v. Davis*, 18 Ga. 679, 686, the rule of law here adverted to is approved by a judge of large experience and reputation. "We approve of modification of the principle, and think that it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendant could not, in the exercise of reasonable diligence, have prevented the collision." So also in *Runyon v. Central Railroad Co.*, 1 Dutcher, 556. But where the plaintiff's conduct is reckless and rash, he cannot recover, if such negligence contributed to the injury, and the defendant acted in good faith. *Sheffield v. Rochester & Syracuse Railroad Co.*, 21 Barb. 339; *Galena & Chicago Railroad Co. v. Fay*, 16 Ill. 558. See also *Center v. Finney*, 17 Barb. 94; *Moore v. Central Railroad Co.*, 4 Zab. 268, 824; *Mackey v. New York Central Railroad Co.*, 27 Barb. 528. And in *Macon & Western Railroad Co. v. Wynn*, 19 Ga. 440, it is held, that if, notwithstanding the negligence of the defendant, the plaintiff in the exercise of common care and prudence might have avoided the injury, he cannot recover. And the general proposition held in *Macon & Western Railroad Co. v. Davis*, *supra*, is reaffirmed in the *Central Railroad & Banking Co. v. Davis*, 19 Ga. 437.

⁷ *Birge v. Gardiner*, 19 Conn. 507; *Chicago, Burlington, & Quincy Railroad Co. v. Payne*, 49 Ill. 499; *Bird v. Holbrook*, 4 Bing. 628. This is the case of spring-guns set in the defendant's grounds without plaintiff's suspecting it. See also *Ilott v. Wilkes*, 3 B. & Ald. 304, where the plaintiff had reason to suspect the danger, and might by the exercise of prudence have escaped it, and he failed to recover. *Cotterill v. Starkey*, 8 Car. & P. 691. There are numerous cases where a party has been held responsible for allowing real property to remain and be used in a condition unsafe for others, who might rightfully or even wrongfully pass it. As where one employed a coal-dealer to put coal upon his premises, and in so doing he opened a trap-door, and by means of its not being properly guarded, a person having occasion to pass there was injured by falling into it. *Pickard v. Smith*, 10 C. B. N. S. 470. But where one has a mere license to pass premises, and the owner has machinery there and a shaft sunk in connection therewith, the contractor is not responsible for insufficient fencing, whereby such person is injured. *Bolch v. Smith*, 7 H. & N. 736. Nor is a canal company bound to fence or light the banks of the canal. *Bincks v. South Yorkshire Railway & River Dun Navigation Co.*, 3 B. & S. 244; s. c. 7 Law T. N. S. 350. A railway company is liable for having stairs in improper condition for safe use, where one fell down the stairs, and it is shown the accident occurred from the defect. *Davis v. London & Brighton Railway Co.*, 2 Fost. & F. 588; see also *Wilkinson v. Fairrie*, 1 H. & C. 633; s. c. 9 Jur. N. S. 280; *Hadley v. Taylor*, Law

* 5. But in all cases where both parties are in fault, and the plaintiff's fault was upon a point which he knew, or had reason to believe, would or might contribute to the injury, he cannot recover; and the rule laid down by Lord ELLENBOROUGH, C. J., in *Butterfield v. Forrester*, applies to the great majority of cases involving this inquiry: "One person being in fault will not dispense with another using ordinary care for himself. Two things must concur to support this action: an obstruction in the road, by the default of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

6. One being in the baggage car, with the knowledge of the conductor, will not preclude him from a recovery for an injury caused by a collision, even though he might or would not have been injured if he had remained in the passenger car.⁸ (f) And

Rep. 1 C. P. 53; s. c. 11 Jur. N. S. 979; *Gray v. Pullen*, 11 Law T. N. S. 569; *Welton v. Dunk*, 4 Fost. & F. 298; *Lee v. Riley*, 18 C. B. N. S. 722.

The courts in Ireland persistently maintain, that the negligence of the plaintiff, although contributing directly to his injury, will not preclude a recovery, provided the defendant might still have avoided doing the damage. *Doyle v. Kinahan*, 17 W. R. 679; *infra*, pl. 27 and note. And some of the American cases seem to have placed themselves on the same high and most unquestionable ground. *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380; *McPheeters v. Hannibal & St. Joseph Railroad Co.*, 45 Mo. 22; *Chicago & Alton Railroad Co. v. Gretzner*, 46 Ill. 75. *ROBERTSON, J.*, in *Kentucky Central Railroad Co. v. Dills*, 4 Bush, 594; *Louisville & Nashville Railroad Co. v. Sickings*, 5 Bush, 1; s. c. *infra*, p. 252. But the Massachusetts court seems to deny all right to recover where the plaintiff's want of due care contributed in any degree directly to the damage. *Murphy v. Deane*, 101 Mass. 455.

* *Carroll v. New York & New Haven Railroad Co.*, 1 Duer, 571. The Court here say: "He was under no obligation to be more careful and prudent than he was, in contemplation of there possibly being such highly culpable conduct on their part." But where, by the general regulations of the company, its engineers were prohibited from allowing any one not in its employ to ride on the engine, and the plaintiff was by the engineer permitted to ride on the engine without paying fare, after he had been informed of the company's regulations on the subject, and sustained an injury while so riding, it was held that he was a wrongdoer and could not recover, the consent of the engineer conferring no legal right. It was also said, that the burden of showing the authority of the engineer was on the plaintiff, the presumption being that the plaintiff had no right to ride on the engine, whether he paid fare or not. *Robertson v. New York & Erie Railway Co.*, 22 Barb. 91.

(f) But otherwise where to ride rules of the company. *Peoria & Rock Island Railroad Co. v. Lane*, 88 Ill.

where a passenger upon a stage-coach was injured by the overturning of the carriage, after he had been requested by the driver to ride inside the carriage, and had refused, and was told that if he kept the outside he must do it at his own risk, it was held that this * would not exonerate the carrier, it appearing that the accident occurred from the negligence of the driver, and that the position of the plaintiff in no way contributed to it.⁹ And we apprehend that the plaintiff's negligence, in order to excuse the defendant from responsibility, must always be such as contributed directly to the injury.¹⁰

7. And where the locomotive of a railway ran across the legs of a person walking on the track in the streets of a city, it was held that the person could not recover if his own negligence contributed to the injury; and that a railway is not bound to the same degree of care in regard to mere strangers who may voluntarily, but unlawfully, go on the track, which it owes to passengers.¹¹

⁹ *Keith v. Pinkham*, 43 Me. 501. *Lackawanna & Bloomsburg Railroad Co. v. Chenewith*, 52 Penn. St. 382.

¹⁰ *Colegrove v. New York & Harlem Railroad Co.*, 6 Duer, 382; s. c. 20 N. Y. 492.

¹¹ *Brand v. Troy & Schenectady Railroad Co.*, 8 Barb. 368. The latter proposition stated in the text in reference to this case, is highly reasonable and just and most unquestionable. See *Philadelphia & Reading Railroad Co. v. Hummell*, 44 Penn. St. 375.

448; *Pennsylvania Railroad Co. v. Langdon*, 92 Penn. St. 21; *Houston & Texas Central Railroad Co. v. Clemmons*, 55 Tex. 88; *Kentucky Central Railroad Co. v. Thomas*, 79 Ky. 160. And the conductor cannot license the violation of such a rule. *Pennsylvania Railroad Co. v. Langdon*, *supra*. The company is liable, however, where the injury was caused by the gross neglect of its employés. *Watson v. Northern Railway Co.*, 24. U. C. Q. B. 98. But where a passenger steps out on the platform in the dark while the train is standing on a trestle, and by a sudden jerk of the train is thrown off and injured, he cannot recover.

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He is guilty of negligence. *Rockford, Rock Island, & St. Louis Railroad Co. v. Coultas*, 67 Ill. 398. And in no case can the passenger recover for an injury received while riding on the platform, unless from a wanton, wilful act. *Camden & Atlantic Railroad Co. v. Hoosey*, 99 Penn. St. 492; *Taylor v. Danville, Olney, & Ohio River Railroad Co.*, 10 Brad. 311. See *Alabama Great Southern Railway Co. v. Hawk*, 72 Ala. 112. And a lack of seats will not justify the passenger in such an act. *Chicago & Northwestern Railway Co. v. Carroll*, 5 Brad. 201.

8. It was held that a passenger, who, having live-stock upon the train of freight cars, was by the regulations of the company required to remain upon the cars that contained his stock, was not precluded from recovering for an injury by collision with another train, by reason of his being, at the time, in another part of the train.¹² (g)

9. And it seems that the negligence of those who carry the plaintiff contributing to the injury, will preclude his recovery as much as if it were his own act.¹³ But the negligence must be of a character directly and naturally to contribute to the injury, it would seem, in either case,¹³

¹² *Pennsylvania Railroad Co. v. McCloskey*, 23 Penn. St. 532; s. c. 2 Redf. Am. Railw. Cas. 466. It is here said that a passenger is not in fault in obeying the specific instructions of the conductor, although they are in conflict with the general regulations of the company, known to him. Such a passenger is not to be regarded as not having paid fare. *Pennsylvania Railroad Co. v. Henderson*, 51 Penn. St. 315.

¹³ *Thorogood v. Bryan*, 8 C. B. 115; *Catlin v. Hills*, 8 C. B. 123. In *Colegrove v. New York & New Haven Railroad Co.*, 6 Duer, 382, it is held, that where a collision occurs through the fault of two companies, running on the same track, and the suit is against them jointly, if it is a misjoinder, it may be waived by pleading to the merits; also, that each company, in such case, is liable for the injury to plaintiff, although both are in fault, and that plaintiff may recover, although he was standing on the platform of the car, there being no notice posted up in the car prohibiting such practice, as required by the statute, and no right in the other company to run on the track that day, and no reasonable ground to apprehend that it would attempt to do

(g) See *Ohio & Mississippi Railway Co. v. Selby*, 47 Ind. 471; *Jenkins v. Chicago, Milwaukee, & St. Paul Railway Co.*, 41 Wis. 112; *Waterbury v. New York Central & Hudson River Railroad Co.*, 17 Fed. Rep. 671. That the passenger is in a car not intended for passengers raises no legal presumption of negligence on his part. *Creed v. Pennsylvania Railroad Co.*, 86 Penn. St. 139. But see *contra*, *Eaton v. Delaware, Lackawanna, & Western Railroad Co.*, 57 N. Y. 382. To ride on the pilot of the engine is negligence. *Rucker v. Missouri Pacific Railroad Co.*, 61 Tex. 499. As to riding on the locomotive generally, see *Waterbury v. New York Central & Hudson River Railroad Co.*, 17 Fed. Rep. 671; *Nashville & Chattanooga Railroad Co. v. Erwin*, 3 Am. & Eng. Railw. Cas. 465; *Wabash, St. Louis, & Pacific Railway Co. v. Shacklet*, 105 Ill. 364. Whether a passenger is guilty of negligence in standing in the car while the train is moving into the station, see *Railroad Co. v. Pollard*, 22 Wal. 341. To get on a train at a place other than a platform is not negligence *per se*. *Stoner v. Pennsylvania Railroad Co.*, 98 Ind. 354.

* 10. One party being in fault will not excuse the other party if, by the exercise of ordinary care, he might still have avoided the injury, notwithstanding the fault of the first party.¹⁴ This point is illustrated by a case,¹⁵ where a boy, ten years old, wrongfully came upon a street railway car while it was in motion, without the means or the intention of paying fare.

11. And what is proper care will be often a question of law, where there is no controversy about the facts.¹⁶ But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.¹⁷ (*h*)

so. In this case, the charge to the jury that the plaintiff's negligence, in order to defeat the action, must have contributed to the "accident which caused the injury," was held well enough, and in popular language equivalent to saying that it "must have contributed to the injury complained of." But it seems that these terms are not altogether equivalent. The misconduct of plaintiff might not have the slightest agency in the production of the "accident which caused the injury," and still might have been the procuring cause of the injury itself. The word "accident" is susceptible of such an application as to stand for the injury itself. But the charge in this case excluded that view; and in popular language the "accident is the cause of the injury." See *Chicago, Burlington, & Quincy Railroad Co. v. Coleman*, 18 Ill. 297.

Where the vehicle of a passenger-carrier is injured by a collision resulting from the mutual negligence of those in charge of it and of another party, the carrier must answer for the injury. But if the negligence of the carrier did not directly contribute to the injury, though there may have been negligence in a general sense, the other party will be answerable if the act of his servant or agents was the proximate cause of the disaster. *Lockhart v. Lichtenthaler*, 46 Penn. St. 151. A query is here made as to whether the defence of concurrent negligence in the agencies producing death, if a defence at all, can be heard without being specially pleaded. But the contrary is held in *Colegrove v. New York & Harlem Railroad Co.*, 6 Duer, 382, and in *Chapman v. New Haven Railroad Co.*, 19 N. Y. 341. The negligence of the party's servants or agents will, of course, have the same effect in precluding a recovery, as if it were that of the party himself. *Schular v. Hudson River Railroad Co.*, 38 Barb. 653.

¹⁴ *Trow v. Vermont Central Railroad Co.*, 24 Vt. 487; 13 Ga. 86.

¹⁵ *Lovett v. Salem & South Danvers Railroad Co.*, 9 Allen, 557; *Owens v. Hudson River Railroad Co.*, 2 Bosw. 374.

¹⁶ *Trow v. Vermont Central Railroad Co.*, 24 Vt. 487; *Henning v. New York & Erie Railway Co.*, 13 Barb. 9; *Gahagan v. Boston & Lowell Railroad Co.*, 1 Allen, 187.

¹⁷ *Quimby v. Vermont Central Railroad Co.*, 23 Vt. 387; *Briggs v. Taylor*,

(*h*) The question of contributory depends on a number of circumstances negligence is for the jury, when it from which different minds might
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*12. It has been held that a passenger in a railway car is not bound, in order to entitle himself to an indemnity against the

28 Vt. 180; s. c. 2 Redf. Am. Railw. Cas. 558; Pfau v. Reynolds, 53 Ill. 212; Mahoney v. Metropolitan Railroad Co., 104 Mass. 73; Patterson v. Wallace, 1 Macq. Ap. Cas. 748; s. c. 28 Eng. L. & Eq. 48. Here the judgment of the court below was reversed, although there was no controversy about the facts, but only as to whether a certain result was to be attributed to negligence on one side or rashness on the other. The judge having withdrawn the case from the jury in the court below, it was held, in the House of Lords, to be a pure question of fact for the jury. See Taff Vale Railway Co. v. Giles, 2 Ellis & B. 822; s. c. 22 Eng. L. & Eq. 202; New York & Erie Railway Co. v. Skinner, 21 Penn. St. 298. In Murray v. Railroad Co., 10 Rich. 227, it was held, that it was the duty of a railway company to slacken speed at a turnout, and to give warning when approaching a crossing; and it must not appear that such duties were disregarded, when the company attempts to show itself not guilty of negligence. See Chicago, Burlington, & Quincy Railroad Co. v. Hazzard, 26 Ill. 373, where it is held, that it is not negligence in an engineer of a train, on arriving at a station, if he should let on more than the exact quantity of steam necessary to overcome the friction of frogs and switches, thereby creating a jerking motion of the train, provided in so doing he exercises a reasonable discretion. It is not usual to place a chain across the back end of the platform of a caboose car, and the omission to do so is not negligence. A passenger taking a freight train takes it with the increased risk or diminution of comfort incident thereto, and if it is managed with the care requisite for such trains it is all that he has a right to demand. *Ib.* And where one attempted without any necessity to pass between cars in motion propelled by an engine, it was held to be such unequivocal evidence of negligence, that the court was justified in charging the jury, as matter of law, that the party could not recover. Gahagan v. Boston & Lowell Railroad Co., 1 Allen, 187. And where a person of mature years knew that a freight train was standing ready to move between him and the passenger train, and that his passing in the night-time through the freight train might not be seen by those managing it, and they were not notified of his design to pass, it was held that passing would amount to such negligence on his part as to defeat a recovery. It would be otherwise had a child or person of less than ordinary discretion so conducted. Chicago, Burlington, & Quincy Railroad Co. v. Dewey, 26 Ill. 255. See also Chicago, Burlington, & Quincy Railroad Co. v. Hazzard, 26 Ill. 373.

There is a distinction in practice between the English and most of the draw different conclusions. Pennsylvania Railroad Co. v. Fortney, 90 Penn. St. 323; Corcoran v. New York Elevated Railroad Co., 19 Hun, 368; Marietta & Cincinnati Railroad Co. v. Pickersley, 24 Ohio St. 654; Nebraska v. Central Pacific Railroad Co., 62 Cal. 320; McNarra v. Chicago & Northwestern Railway Co., 41 Wis. 69. It is for the court when the facts are clearly settled. Pennsylvania Railroad Co. v. Richter, 42 N. J. Law, 180; Fernandes v. Sacramento City Railway Co., 52 Cal. 45.

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negligence of the company, to select his seat so as to incur the least hazard.¹⁸ All that is requisite in such case is that the plaintiff should, at the time, have been where it was lawful for him to be.¹⁸

American courts in regard to submitting questions of negligence to the jury. There is a very prevalent opinion here, that so long as there is any, the merest scintilla of evidence of negligence, it remains a question for the jury, and that the verdict is conclusive. *Weil v. Express Co.*, 26 Phila. 325. And where the court has no power to grant new trials, when the jury find against the fair weight of the evidence, this is unquestionably the true view. But where the courts hold a supervision over verdicts against evidence, it is the more common, and would seem to be the true rule, for the court to direct the jury where there is no such amount of evidence of negligence as will fairly justify a verdict. This is the rule as stated by WILLES, J., in *Ryder v. Wormbell*, Law Rep. 4 Exch. 32, 39, in Exchequer Chamber, where the learned judge said: "It was formerly considered necessary in all cases to leave the question to the jury, if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, as is stated by MAULE, J., in *Jewell v. Parr*, 13 C. B. 916, not whether there is virtually no evidence, but whether there is none that ought reasonably to satisfy the jury, that the fact sought to be proved is established. In *Toomey v. London & Brighton Railway Co.*, 3 C. B. N. s. 158, WILLIAMS, J., states the same rule in similar language."

It was held evidence of negligence for the driver of a street car to bring the car nearly to a stand when a passenger was about leaving the car, and then start up suddenly without giving notice, whereby the passenger was injured. *Nichols v. Sixth Avenue Railroad Co.*, 38 N. Y. 131. See also *Geddes v. Metropolitan Railroad Co.*, 103 Mass. 391. In *Schierhold v. North Beach Railroad Co.*, 40 Cal. 447, where the action was for killing a child by defendant's horse-car, recklessly driven, and the court nonsuited the plaintiff on the ground of contributory negligence, a new trial was ordered on the ground that such a decision could be justified only when the court saw clearly that a verdict for the plaintiff must necessarily be set aside. Where one attempted to get on a railway train in motion and was thrown down and killed, it was held, as matter of law, that no recovery could be had. *Knight v. Pontchartrain Railroad Co.*, 23 La. An. 462. But where one jumped from a train in motion by direction of the conductor and was killed, it was held not to amount to contributory negligence. *Lambeth v. North Carolina Railroad Co.*, 66 N. C. 494. And where a passenger returning from market got on the front platform of a street car, and there deposited his basket, and was thrown off and suffered damage by the starting of the car, it was held that he could not recover, having attempted to enter the car by the front platform when he knew the rules of the company forbade it, such a regulation being reasonable and proper. *Baltimore City Passenger Railroad Co. v. Wilkinson*, 30 Md. 224; *supra*, Vol. I., § 28, pl. 15.

¹⁸ *Carroll v. New York & New Haven Railroad Co.*, 1 Duer, 571, 572. And if he were leaning against a door of the carriage to look out through the glass

13. If one should, contrary to the established regulations of the company notified to him generally, and especially by particular notice from the conductor at the time, expose himself to peril, as by letting his hand remain out of the car window while passing a bridge, it would be evidence of gross carelessness upon his part, which would, on that ground alone, justify a verdict against his claim for damages.¹⁹

portion of it, whereby it was pushed open and he fell out and was injured, he will not thereby be precluded from a recovery. *Gee v. Metropolitan Railway Co.*, 23 Law T. 822.

¹⁹ *Laing v. Colder*, 8 Penn. St. 479. But see *New Jersey Railroad Co. v. Kennard*, 21 Penn. St. 203, where it was held, that if a railway company run passenger cars on a road where the way is so narrow as to endanger the arms of the passengers, while resting in the windows of the cars, they are bound to provide wire gauze, bars, slats, or other barricades, to prevent passengers from putting their arms out of the windows, or respond in damages for all injuries happening in consequence of such omission. But to deprive the party of his right to recover, it must appear that his violation of the rules of the company, or the orders of the company's servants, contributed to the injury. But the case last cited, on further consideration, has been overruled by the same court, in *Pittsburg & Connellsville Railroad Co. v. McClurg*, 7 Am. Law Reg. n. s. 277; s. c. 56 Penn. St. 294. And the doctrine of the latter case is maintained in *Indianapolis & Cincinnati Railroad Co. v. Rutherford*, 7 Am. Law Reg. n. s. 476; s. c. 29 Ind. 82; see *infra*, pl. 25, note 36. In a recent case, *Louisville & Nashville Railroad Co. v. Sickings*, 5 Bush, 1, where the company had switched off two freight cars, at a lumber mill, for the convenience of the mill-owners, to be loaded by them, and in doing so moved one of the cars so near the main track, that some portion of the furniture of the car came in contact with the arm of a passenger, lying out of the window of a passing passenger carriage, and severely fractured it, it was held to be such negligence on the part of the passenger, to have his arm in such place, that he could not recover of the company without showing its conduct to have been such that it might have avoided the consequences of the plaintiff's negligence, if it had made the proper exertion. One who persists in getting off a train of cars while in motion, and especially when warned by the conductor not to do so, has no claim for damages against the company for any injury he may sustain thereby. *Ohio & Mississippi Railroad Co. v. Schiebe*, 44 Ill. 460. So one who leaves the platform which extends to the highway, and walks across the track in the night-time merely to reach the highway by a short cut, and falls into a hole, has no one but himself to blame, and cannot recover of the company. *Forsyth v. Boston & Albany Railroad Co.*, 103 Mass. 510.

But one who is injured by leaving the cars in the only practicable manner, or by direction of the conductor, is not precluded from recovery, as matter of law, or unless the jury find the party guilty of fault amounting to more than exposure to danger. *Delamatyr v. Milwaukee & Prairie du Chien Railroad Co.*, 24

*14. But one is not precluded from recovery for an injury caused by the negligence of the company, because he was standing upon the platform of the cars. And the statute of the state of New York providing that where a passenger is so injured the company shall not be liable, provided there was at the time sufficient room in the inside of the cars for the accommodation of such passenger, has reference to such casualties as prove injurious only to persons upon the platforms of the cars. And a railway company, in order to claim the exemption created by the statute, must show not only that there was room within the cars sufficient to contain the passenger, but that there were seats unoccupied. And passengers are not obliged to urge other passengers to give up half a seat, or even whole seats, needlessly occupied by them.³⁵

15. The burden of proof in regard to negligence in the company, and due care on his own part, is upon the plaintiff who alleges an injury by one of the company's engines.³⁰ But as neg-

Wis. 578. And where the conductor of a gravel train, who was prohibited by the company from letting persons ride, as passengers, and who informed one of the prohibition, but nevertheless consented to take him as a passenger, and received fare from him, it was held he might recover of the company for an injury, through the negligence of its servants during his passage. *Lawrenceburgh & Upper Mississippi Railroad Co. v. Montgomery*, 7 Ind. 474. See also *Zemp v. Wilmington & Manchester Railroad Co.*, 9 Rich. 84, where the plaintiff was injured while standing on the platform of the cars, the passengers remaining in the cars uninjured, and it appearing that notices were posted up in the cars prohibiting passengers from standing on the platforms, it was held to be a question for the jury whether the plaintiff had notice of the prohibition, and also whether the fact of his disregarding it contributed to the injury; and the jury having failed to find these facts, and given the plaintiff ten thousand dollars damages, the judgment was affirmed in the Court of Appeals. *Ib.*

³⁰ *Robinson v. Fitchburg & Worcester Railroad Co.*, 7 Gray, 92. The courts have sometimes gone very far in the admission of evidence to prove negligence on the part of railway companies, as that negligence may be presumed where a collision occurs, from the bad habits of the conductors, which might be proved as evidence of negligence. It would seem far more reasonable to presume negligence on the part of the management from the mere fact of the collision. *Pennsylvania Railroad Co. v. Books*, 57 Penn. St. 339. And although the majority of the American courts lay down the rule as stated in the text, that the burden of proof is on the plaintiff to show that he was guilty of no negligence on his own part, we still think the point is not well defined in these terms. All that is meant, we apprehend, is, that where there is any evi-

ligence on the part of the plaintiff is not to be presumed, he is not bound to introduce positive evidence of the negative ; but where there is conflicting evidence upon the point, the burden of proof is upon him.²¹ (i)

* 16. After the presumption of negligence has been established against a carrier of passengers, it can only be rebutted by showing that the accident was the result of circumstances against which human prudence could not have guarded. By this we are to understand such prudence or precaution as one might have

dence tending to prove either directly, or from the manner of the accident, that there might have been fault on the part of the plaintiff, he must assume the burden on the whole issue of satisfying the jury that the injury occurred through the fault of the defendant, and that his own want of care at the time did not in any sense contribute directly to it. The result of the rule thus stated would be that where there was no evidence of any want of care on the part of the plaintiff, the law would presume none existed, as in regard to good character in a witness, or sanity in one where there is no proof. This is the rule laid down in the case of *New Jersey Express Co. v. Nichols*, 4 Vroom, 434. But see *contra*, *Waters v. Wing*, 59 Penn. St. 211.

²¹ *Button v. Hudson River Railroad Co.*, 18 N. Y. 248. But it has sometimes been claimed that the plaintiff must give affirmative evidence of his own exercise of due care and caution at the time the injury occurred. But this, in principle, is much like one giving evidence of the good character of his witnesses, before any impeachment, and, we think, should never be required. *Mayo v. Boston & Maine Railroad Co.*, 104 Mass. 137; *Chicago & Pittsburg Railroad Co. v. Rowan*, 66 Penn. St. 393. See also *Barber v. Essex*, 27 Vt. 62; *Hill v. New Haven*, 37 Vt. 501.

(i) This would seem to want support. The cases are numerous which hold that contributory negligence is matter of defence, and to be proved by the defendant. See *Chadbourne v. Delaware, Lackawanna, & Western Railroad Co.*, 6 Daly, 215; *Pennsylvania Railroad Co. v. Weber*, 76 Penn. St. 157; *Carter v. Columbia & Greenville Railroad Co.*, 19 S. C. 20; *Central Railroad Co. v. Brinson*, 64 Ga. 475; *Paducah & Memphis Railroad Co. v. Hoehl*, 12 Bush, 41; *Kentucky Central Railroad Co. v. Thomas*, 79 Ky. 160; *Savannah & Memphis Railroad Co. v. Shearer*, 58 Ala. 672.

There are, however, many cases which hold *contra*. See *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622; *Nelson v. Chicago, Rock Island, & Pacific Railroad Co.*, 38 Iowa, 564; *Walsh v. Oregon Railway & Navigation Co.*, 10 Oreg. 250; *Mitchell v. Chicago & Grand Trunk Railway Co.*, 12 Am. & Eng. Railw. Cas. 168.

As to what will make a question of negligence to go to the jury, see *Treat v. Boston & Lowell Railroad Co.*, 131 Mass. 371; *Weller v. London, Brighton, & South Coast Railway Co.*, Law Rep. 9 C. P. 126.

taken before the occurrence, and not that which afterwards it may be apparent would have been proper.²³

17. One who attempts to cross a railway track about the time a train of cars is due, and with his head so bundled as to impair his hearing, and without looking to see if the cars are approaching, is guilty of such negligence that he cannot recover for an injury thereby sustained; and it will make no difference that the engineer gave no warning of the approach of the train, as the statute requires. Such omission on the part of the company does not affect their liability otherwise than the omission of any common-law duty, unless some specific consequence is expressly provided in the statute as the result of such omission.²³ (j)

18. One who, after the proper signals are given by a passing train, and while the flagman is upon the crossing waving his flag, is killed in attempting to rush his team across the track of a railway in a highway, is guilty of such reckless and foolhardy misconduct, that no recovery can be had for the injury.²⁴

19. And where one, while waiting for a train in the daytime, caught his foot against a weighing machine, the edge of which was raised a few inches above the platform, where it was necessary to be used in weighing baggage, and thereby fell and broke his kneepan, it was held there was no evidence to justify a recovery to go to the jury.²⁵

20. In an English case,²⁶ where the question of the degree of caution required of passenger carriers is carefully considered, it is said, that, in determining whether evidence of negligence has been given before the jury, the court must use the ordinary experience of life, and must consider whether the evidence of negligence be reasonable. And in commenting upon the case, which * was where the plaintiff fell, upon a staircase, in going from the platform into the street, in consequence, as he alleged, of the stairs being rendered slippery by reason of brass nosing upon the edge of the steps, and having no hand-rail upon the top of the banisters,

²³ *Bowen v. New York Central Railroad Co.*, 18 N. Y. 408.

²³ *Steves v. Oswego & Syracuse Railroad Co.*, 18 N. Y. 422.

²⁴ *Wild v. Hudson River Railroad Co.*, 24 N. Y. 430.

²⁵ *Cornman v. Eastern Counties Railway Co.*, 4 H. & N. 781.

²⁶ *Crafter v. Metropolitan Railway Co.*, Law Rep. 1 C. P. 300; s. c. 12 Jur. N. S. 272.

(j) See *supra*, § 138.

the learned judges declare, that passengers are not entitled to have every precaution to insure safety which it is possible to suggest, after an accident has occurred, might have prevented it.²⁶ If any actual damage accrues to the passengers from the construction of a passage which they will naturally take, the company are responsible,²⁷ as where there was an aperture in the railing of a bridge.²⁷ But if a stairway is protected by walls on each side, the railway company is not bound to maintain a hand-rail upon the top of it for passengers to steady themselves by; or to put lead upon the edge of the steps instead of brass, because it is less slippery. The opinion of witnesses is not competent evidence of the necessity of such precautions.²⁶

21. The English courts seem finally to have come to the definite conclusion that there is no difference between negligence and gross negligence, the latter being nothing more than the former with a vituperative epithet.²⁸ (k) And in the same case it was decided, that where the bill of lading specially excepted "perils of the sea," this will not embrace those perils which become disastrous by reason of the negligence or want of skill of the carrier and his servants. And the same rule was laid down in a former action against the same company.²⁹

22. The question what degree of negligence will preclude the party from recovery of another who is guilty of negligence directly tending to produce the injury, is extensively and judiciously discussed in *Isbell v. New York & New Haven Railroad Company*,³⁰ and the conclusion reached, that it must be a direct

²⁷ *Longmore v. Great Western Railway Co.*, 19 C. B. N. s. 188; *Rigg v. Manchester, Sheffield, & Lincolnshire Railway Co.*, 12 Jur. N. s. 524.

²⁸ *Grill v. Iron Screw Collier Co.*, Law Rep. 1 C. P. 600; s. c. 12 Jur. N. s. 727.

²⁹ *Lloyd v. General Iron Screw Co.*, 3 H. & C. 284; s. c. 10 Jur. N. s. 661.

³⁰ 27 Conn. 393; s. c. 2 Redf. Am. Railw. Cas. 474. It is said in *Cotten v. Wood*, 8 C. B. N. s. 568, 7 Jur. N. s. 168, that it is equally the duty of one crossing a street or road to look out for vehicles coming along, as it is for the

(k) And the doctrine of comparative negligence is denied in the courts of several of our states. It is denied e. g., in Illinois. *Chicago, Burlington, & Quincy Railroad Co. v. Dougherty*, 12 Brad. 181, and cases *passim* in the reports of the decisions of the courts of that state. Also in New Jersey. *Pennsylvania Railroad Co. v. Righter*, 42 N. J. Law, 180. And in Kansas. *Kansas Pacific Railway Co. v. Peavey*, 29 Kan. 169. And in Texas. *Houston & Texas Central Railway Co. v. Gorbett*, 49 Tex. 578.

and actual, and not merely a constructive wrong, and one that is the proximate cause of the injury, and not merely the remote and incidental cause of it.³⁰

* 23. The rule of law deducible from the cases is fully and correctly stated, we believe, in a case decided in the Exchequer in Ireland.³¹ The plaintiff cannot recover unless the injury was caused by the negligence of the defendant; nor even then, if he has so far contributed to the accident, by want of ordinary care, that but for that the accident would not have happened; but strictly, even in that case, the plaintiff is not precluded from a recovery if the defendant might, by ordinary care, have avoided the consequences of the plaintiff's neglect. So also the mere happening of an accident is not sufficient evidence of negligence, ordinarily, to be left to the jury, but the plaintiff should give some affirmative evidence of negligence on the part of the defendant.³² (1) But in many cases the very happening of the accident shows want of due care, as where the defendants let fall a barrel of flour upon the plaintiff as he was passing the street.³³ And where

drivers of these vehicles to be vigilant in not running against persons crossing; and that one suing for injury must give affirmative and preponderating evidence of neglect of duty on the part of the driver. And it is there declared to be established, that where the evidence on each side in cases of this kind is equally strong against the other's negligence having caused the accident, the judge ought not to leave it to the jury as proving negligence either way. But perhaps, where the evidence is conflicting, the judge is not the proper functionary to determine whether it is equally strong both ways. We should say he must submit it to the jury with instructions not to find a verdict on an equal balance of evidence.

³¹ *Scott v. Dublin & Wicklow Railway Co.*, 11 Ir. Com. Law, 377.

³² *Hammack v. White*, 11 C. B. N. s. 588; s. c. 8 Jur. N. s. 796. But if the accident occurs from a cause, or under circumstances which do not ordinarily exist except through some default either of the carrier or maker of the failing article, the burden of proof is on the carrier. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

³³ *Byrne v. Boadle*, 2 H. & C. 722. See also *Cox v. Burbridge*, 13 C. B. N. s. 430; s. c. 9 Jur. N. s. 970; *Scott v. London Docks Co.*, 3 H. & C. 596; s. c. 10 Jur. N. s. 108; s. c. 11 Jur. N. s. 204. It was here declared by the

(1) The mere fact that the plaintiff was injured raises no presumption either way. *Railroad Co. v. Mitchell*, 11 Heisk. Tenn. 400. But if it appear that the passenger was without fault, the presumption is that the carrier was negligent. *Railroad Co. v. Pollard*, 22 Wal. 341; *Pittsburg & Connellsville Railroad Co. v. Pillow*, 76 Penn. St. 510; *Pittsburg, Cincinnati, & St. Louis Railroad Co. v. Williams*, 74 Ind. 462.

an engine-driver blew off steam at a road-crossing on grade, where there was considerable passing, in such a manner as needlessly to

Exchequer Chamber, that where the thing which causes the accident is known to be under the management of the defendant or his servants, and the accident is such as would not happen in the ordinary course of management, the accident itself, if unexplained, is reasonable evidence of negligence. And this seems to be the true ground on which to rest the question. Where there are two modes of doing work in a public highway from which damage may result to a passer-by, both of which are usual, but one more dangerous than the other, it is for the jury to determine whether it is negligence to adopt the mode whereby others are most exposed. *Cleveland v. Spier*, 16 C. B. N. S. 399. In *Shepherd v. Midland Railway Co.*, 20 W. R. 705, while the plaintiff was waiting for the arrival of the train for which he held a ticket, it being very cold, he continued to walk up and down the platform of the station, it being about half-past three o'clock P. M.; a strip of ice nearly an inch thick extended half way across the platform, and the plaintiff slipping on the ice fell and dislocated his shoulder, for which he sought to recover. There was no evidence how the ice came on the platform or how long it had been there, except that it was surmised it might have come from the leaking of the water-pipes. The question was whether there was any evidence tending to show negligence on the part of the defendants, and the court held there was. It is not to be regarded as evidence of want of care on the part of passengers to be on the platform of the passenger station while waiting for the train. And one while in that position, who became justly excited and alarmed by the train approaching in an unusual direction, by reason of the displacement of a switch through the fault of the company, and having reason to believe from the conduct of the employés of the road and the passengers about the station that she was in imminent danger, and in running to escape it fell and was injured, was held entitled to recover. *Caswell v. Boston & Worcester Railroad Co.*, 98 Mass. 194. Where passengers are required to cross a track at a station in order to reach the place of entering the cars, they have a right to depend on seasonable signals when to pass, and to trust to such signals as indicating a safe passage; and are not chargeable with negligence for not looking up and down the track at the moment for approaching trains, especially where they have done so but a moment before. *Chaffee v. Boston & Lowell Railroad Co.*, 104 Mass. 108. If there is any evidence of want of care on the part of the passengers in such case, it becomes a question of fact for the jury. *Ib.* It seems singular that while in Europe it is regarded as inadmissible for passengers to be allowed to cross the railway tracks at a station, but the companies are required to provide a bridge for that purpose in every instance, it should be held entirely admissible in this country to *drive* passengers across the naked track every time they enter the cars at certain stations! It seems to indicate great indifference to life, to say the least; and the companies should be regarded as scarcely less culpable in case of injury than if it were voluntarily inflicted. See also *Mayo v. Boston & Maine Railroad Co.*, 104 Mass. 187; *Wheelock v. Boston & Albany Railroad Co.*, 105 Mass. 203.

frighten horses waiting to pass the line, it was held sufficient to warrant the inference that there was, in the company, actionable negligence.³⁴ * It seems scarcely necessary to multiply cases to show that passenger carriers must first see that those they carry are properly provided with every reasonable accommodation, and this being done, that passengers who desire to secure their own safety, or failing of that to hold the carrier responsible for consequences, must keep in their places.

24. Thus in the state of New York, where, by statute, passengers injured while standing upon the platforms of the cars while in motion, and in violation of express notices posted within their view, are precluded from maintaining an action, provided there was at the time sufficient room within the cars, it was held that a passenger who selected the safest place he could find upon the platform, and was injured while standing there, was not within the provisions of the statute, unless the company provided him a seat within the cars, and that for that purpose he was not obliged to displace the person, or property, of another passenger, that being the duty of the conductor; and that it was no sufficient compliance with the statute, that there might have been sufficient room in a car, remote from the place where the plaintiff was allowed to enter.³⁵

25. So, also, where the plaintiff's arm, being outside the window, was injured by the swinging of the unfastened door of another car, it was held he could not recover, it being his duty to keep his entire person within the limits of the car he sat in. And in such case, it was held competent for the court to direct a verdict for the defendants, there being no controversy in regard to the plaintiff having voluntarily placed his arm beyond the point where the sash of the window would fall.³⁶ (m) So, too, where a railway

³⁴ Manchester, South Junction, & Altrincham Railway Co. v. Fullarton, 14 C. B. N. S. 54.

³⁵ Willis v. Long Island Railroad Co., 34 N. Y. 670.

³⁶ Todd v. Old Colony Railroad Co., 9 Allen, 18; s. c. 7 Allen, 207; *supra*, pl. 13, note 19. But the court cannot decide as matter of law, that standing or riding on the outside platform of a street car is such carelessness as to preclude the party from recovery for an injury sustained by being thrown there-

(m) The wilful violation of any of liability. Pennsylvania Railroad known rule intended for the passengers' safety will relieve the company

passenger train is stopped, at night, to allow a train in the opposite direction to pass, and no notice is given that the passengers may leave the cars, but the plaintiff left the cars and walked into an open cattle-guard, and was injured, it was held he could not maintain any * action therefor; and it will make no difference that the plaintiff had been misinformed, by some one not in the employ of the company, that he must go and see to having his baggage passed at the custom-house, which the train was supposed to have reached, or that the train was near a passenger station, which was not his destination.⁸⁷

26. In some English cases, actions have been brought for injuries to passengers by having their hands shut into the doors of the railway carriages. Such questions will not be likely to occur, unless where the same style of carriages are in use. In one case where the plaintiff placed his hand upon the carriage door to raise himself into the carriage, and the porter immediately closed the door, without giving any warning, shutting in and injuring plaintiff's hand, the court declined to disturb a verdict in his favor.⁸⁸ But in another case, where the plaintiff suffered his hand to remain upon one of the doors after being seated in the cars, knowing the porters would immediately close them, and where timely notice was given before closing them, it was held the plaintiff could not recover.⁸⁹

27. The duty of railways where there is a change of cars has often been commented upon by the courts. It seems to result

from. *Meesel v. Lynn & Boston Railroad Co.*, 8 Allen, 234. So also it is a question of fact, whether passengers may properly pass from one car to another while in motion, in order to find a seat, at the suggestion of the defendants' servants. *McIntyre v. New York Central Railroad Co.*, 37 N. Y. 287. See also *Wayne v. Pennsylvania Railroad Co.*, 53 Penn. St. 460.

⁸⁷ *Frost v. Grand Trunk Railway Co.*, 10 Allen, 387.

⁸⁸ *Fordham v. Brighton Railway Co.*, Law Rep. 3 C. P. 368. This case was affirmed in the Exchequer Chamber, Law Rep. 4 C. P. 619, the court holding that there was evidence of negligence on the part of the company's servant, and no evidence of such contributory negligence on the part of the plaintiff as to entitle the defendant to a nonsuit. The case of *Richardson v. Metropolitan Railway Co.*, *infra*, note 39, is here referred to with approbation. But when a passenger in attempting to close the door of his compartment fell out of the carriage and was injured, the door being open only causing him inconvenience, it was held that he could not recover. *Adams v. Lancashire & Yorkshire Railway Co.*, 17 W. R. 884.

⁸⁹ *Richardson v. Metropolitan Railway Co.*, Law Rep. 3 C. P. 374, and note.

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from the very nature of the case, that the very least which could be regarded as the reasonable performance of the duty of the company towards its passengers would be, that the passengers should have timely notice of the change, and reasonably sufficient time to make it. And where a passenger was injured in attempting to get upon another train while in motion, there being no opportunity to do it otherwise, it was held to be the duty of the court to submit to the jury, how far the passenger was chargeable with contributory negligence, under the circumstances, and whether the fault of the companies in giving no proper time to make the change did not invite and stimulate the plaintiff's conduct.⁴⁰

28. Where railway passenger carriers adopt a dangerous mode of receiving passengers upon their express or other trains, as by merely slackening the speed to enable passengers to come upon the trains while still in motion, and then starting up into full speed, it is not contributory negligence for one to attempt to get upon the train when so invited by the company, whereby he suffered damage, and he may recover therefor of the company.⁴¹

⁴⁰ *Johnson v. Philadelphia & West Chester Railroad Co.*, 11 Am. Law Reg. N. S. 159.

⁴¹ *Phillips v. Rensselaer & Saratoga Railroad Co.*, 57 Barb. 644.

SECTION III.

Injuries by Leaping or Alighting from the Carriages.

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| <ol style="list-style-type: none"> 1. Passenger may recover, if having reasonable cause to leap from the carriage, he sustains injury. 2. But not where his own misconduct exposes him to peril. 3. He may recover, if injured in attempting to escape danger. 4. Not justified in leaping from cars because train passes station. 5, 6. If negligently carried beyond his station, he can only resort to an action for redress. | <ol style="list-style-type: none"> n. (d) Rule as to announcing stations and giving passengers opportunity to alight. 7. Rule where a person enters the cars to see another seated. 8. Company bound to bring train to a full stop, and to keep it standing a sufficient time. 9. Passenger leaving the cars on the wrong side cannot recover for an injury received in consequence. 10-18. Negligence in alighting where train does not stop at platform. |
|---|---|

§ 194. 1. It seems to be regarded as well settled, that a passenger who is induced to leap from the carriage, whether by coach or railway, by a well-founded apprehension of peril to life or limb, induced by any occurrences which might have been guarded *against by the utmost care of the carriers, is entitled to recover for any injury which he may thereby sustain,¹ where no injury would have occurred if he had remained quiet,² (a) or where the conduct of the passenger contributed to produce or enhance the injury.³ (b)

2. In one case, where the passenger was taken upon the train after the passenger cars were filled, and was told that he must ride in the baggage car, and he consented to do so, but soon began boisterous play with others, and obtruded into the passenger cars, and, when they were thrown from the track, leaped upon the ground and was injured,⁴ the court said: "The contract was for

¹ *Ingalls v. Bills*, 9 Met. 1; *Eldridge v. Long Island Railroad Co.*, 1 Sandf. 89; *Stokes v. Saltonstall*, 18 Pet. 181; *Frink v. Potter*, 17 Ill. 406; *Southwestern Railroad Co. v. Paulk*, 24 Ga. 356.

² *Jones v. Boyce*, 1 Stark. 498; *Ingalls v. Bills*, 9 Met. 1.

³ *Stokes v. Saltonstall*, 18 Pet. 181.

⁴ *Galena & Chicago Railroad Co. v. Yarwood*, 15 Ill. 468.

(a) *Gulf, Colorado, & Santa Fe Railroad Co. v. Wallen*, 26 Am. & Eng. Railw. Cas. 219.

(b) See *supra*, § 193, note (b).

a passage in the baggage car. The carrier would have no right to overload and crowd passengers already in the other cars. When passengers take their seats they are entitled to occupy as against the carrier and subsequent passengers. While this right is recognized and protected to them, they are required to conduct themselves with propriety, not violating any reasonable regulation of the train." The court also held that the passengers have no right to pass from car to car, unless for some reasonable purpose; and, as the proof showed that the plaintiff below had no such excuse, and, had he remained in the car where he belonged, would not have been injured (that car not having been thrown from the track), or, probably, have felt any impulse to jump from that car, it was his own fault and folly which exposed him to the peril, and the company were not liable for its consequences, and the action could not be maintained.

3. But where one incurs peril by attempting to escape danger, the author of the first motive is liable for all the necessary or natural consequences.⁵

* 4. But where the passenger leaped from the cars because the train was passing the station at which he wished to stop, and after the conductor had announced the station, (c) notwithstanding

⁵ *Pennsylvania Railroad Co. v. Aspell*, 23 Penn. St. 147, 150. The court here say: "If, therefore, a person should leap from the cars under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself." *McKinney v. Neil*, 1 McLean, 540, 550.

(c) The cases holding it negligence to attempt to alight from a moving train, when prudence would forbid, are numerous. See *Straus v. Kansas City, St. Joseph, & Council Bluffs Railroad Co.*, 75 Mo. 185; *Southwestern Railroad Co. v. Singleton*, 87 Ga. 306; *Burrows v. Erie Railway Co.*, 63 N. Y. 556; *Dougherty v. Chicago, Burlington, & Quincy Railroad Co.*, 86 Ill. 467; *Lake Shore & Michigan Southern Railway Co. v. Bangs*, 47 Mich. 470; *Cumberland Valley Railroad Co. v. Mangans*, 61 Md. 53. The question seems to be, whether, in all the circumstances, it is prudent. *Price v. St. Louis, Kansas City, & Northern Railway Co.*, 72 Mo. 414. It is not negligence *per se*. *Bucher v. New York Central & Hudson River Railroad Co.*, 98 N. Y. 128; *Hannibal & St. Joseph Railroad Co. v. Clotworthy*, 80 Mo. 220; *Nance v. Railroad Co.*, 26 Am. & Eng. Railw. Cas. 223. The cases agree, however, that where the passenger is directed or advised by an employé of the company to jump off, the company may be

ing the conductor and brakeman assured him the train should be stopped and backed to the station, it was held, that the injury he received was the result of his own foolhardiness, and he could not throw it upon the company. The court below had charged the jury, that announcing the station by the conductor while the cars were in motion, was itself an act of negligence, and the plaintiff had a verdict. But the judgment was reversed in the Court of Errors, which, in giving judgment, said :—

5. “ If a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of travelling back, because these are direct consequences of the wrong done him. But, if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, and for this, his own gross imprudence, he can blame nobody but himself.”

6. In regard to the conductor announcing the station, the court said : “ We consider the charge of the court below entirely wrong. It is not carelessness in a conductor to notify passengers of their approach to the station at which they mean to get off, so that they may prepare to leave with as little delay as possible when the train stops. And we cannot see why such a notice should put any man of common discretion in peril. It is scarcely possible that the plaintiff could have understood the mere announcement of the station as an order to leap from the cars without waiting for a halt.” And where the train passes its usual stopping-place, and a passenger leaps from the carriage while in motion, to avoid being carried beyond his destination, and sustains an injury, he cannot recover.⁶ (d)

⁶ *Damont v. New Orleans & Carrollton Railroad Co.*, 9 La. An. 441. But where the court charged the jury that it was clearly the duty of common car-

liable, though to do so is imprudent. *Filer v. New York Central Railroad Co.*, 59 N. Y. 351. See s. c. 68 N. Y. 124; and see also *Taber v. Delaware, Lackawanna, & Western Railroad Co.*, 71 N. Y. 489; *Southwestern Railroad Co. v. Singleton*, 67 Ga. 306; s. c. 68 Ga. 252; *International & Great Northern Railroad Co. v. Hassell*, 62 Tex. 256; *South & North Alabama Railroad*

Co. v. Schaufler, 75 Ala. 136. The plaintiff, an infant, was held to have been in contemplation of law guilty contributory negligence, where she was taken off the moving train by her father. *Morrison v. Erie Railway Co.*, 56 N. Y. 302. And see *Ohio & Mississippi Railway Co. v. Stratton*, 78 Ill. 88.

(d) If the train stops at a place

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* 7. And where a person enters the cars for the purpose of seeing another safely seated, and is injured in leaving them, he cannot recover if he was guilty of negligence which contributed to his injury. And where he attempted to leave the cars after they were in motion, and persisted in attempting to get out, it was held sufficient to preclude his recovery for an injury thereby sustained, notwithstanding the conductor gave him no special notice of the time of the departure of the cars, and was guilty of negligence in starting the cars, and in a jerk occurring soon after, both of which contributed to produce the injury.⁷

8. The company are bound to stop their trains at all stations where they profess to leave passengers, a sufficient time to enable them to alight. And if they do not, and one is injured in conse-

riers of passengers by railway, not only to call out the stations for which they have passengers, but to see that passengers and their baggage are put off at the proper stations, it was held too stringent a rule. *Southern Railroad Co. v. Kendrick*, 40 Miss. 374. But we apprehend such is the general practice of railway conductors, where only one or two or very few passengers leave at stations, and, where there are more, to notify them to leave at the next station, at the time of receiving their tickets. If railway conductors were held bound, as they should be, to give clear information to all passengers, when and where to leave the cars, the passengers themselves would feel less anxiety, and fatal accidents in consequence would not be likely to occur as they sometimes do. But a premature calling of the station, if it induce the passenger to attempt to alight from the carriage, before it has stopped, whereby he suffers damage, will render the company responsible. *London & Northwestern Railway Co. v. Holbrook*, 26 Law T. 557.

⁷ *Lucas v. Taunton & New Bedford Railroad Co.*, 6 Gray, 64.

where it is not safe to alight, the company should assist the passenger or give him warning. *Cartwright v. Chicago & Grand Trunk Railway Co.*, 16 Am. & Eng. Railw. Cas. 321. It has been distinctly held that it is the duty of the company to have stations announced in season to give passengers an opportunity to get off. *Dawson v. Louisville & Nashville Railroad Co.*, 11 Am. & Eng. Railw. Cas. 134. But it may be negligence to call a station in the night and then stop short of the station. *Central Railroad*

Co. v. Van Horn, 38 N. J. Law, 133. Or to call a station before a stop at a railway crossing, and leave the passenger to get off, supposing the train is at the station. *Mitchell v. Chicago & Grand Trunk Railway Co.*, 51 Mich. 236. And see *McKimble v. Boston & Maine Railroad Co.*, 24 Am. & Eng. Railw. Cas. 463. Or to call a station, thus inviting the passenger to alight, and then not stop the train. *Edgar v. Northern Railroad Co.*, 11 Ont. Ap. 452.

quence while attempting to leave the cars, the company are liable.⁸ (e)

9. But if the company had prepared a platform for the accommodation of passengers leaving the cars, and a passenger leaves the cars on the opposite side and is killed in consequence, the company are not responsible, not having been in fault. And even if both parties had been in fault, there could have been no recovery.⁹ (f)

⁸ *Pennsylvania Railroad Co. v. Kilgore*, 32 Penn. St. 292.

⁹ *Pennsylvania Railroad Co. v. Zebe*, 33 Penn. St. 318; s. c. 2 Redf. Am. Railw. Cas. 536.

(e) *Keller v. Sioux City & St. Paul Railroad Co.*, 27 Minn. 178; *Bucher v. New York Central & Hudson River Railroad Co.*, 98 N. Y. 128; *Jeffersonville Railroad Co. v. Parmelee*, 51 Ind. 42. And where the train has come to a full stop the train should not be suddenly moved without warning, while passengers are getting out. *Wood v. Lake Shore & Michigan Southern Railway Co.*, 49 Mich. 370; *Nance v. Railroad Co.*, 26 Am. & Eng. Railw. Cas. 223. But compare *Lewis v. London, Chatham, & Dover Railway Co.*, Law Rep. 9 Q. B. 66. And for injury thereby to a passenger the company will be liable, though the passenger is intoxicated; and it will make no difference whether the movement is forward or backward. The intoxication of the passenger may, however, have a bearing on the question of contributory negligence. *Milliman v. New York Central & Hudson River Railroad Co.*, 66 N. Y. 642. But the company is not liable where a passenger, standing on the lower step of the platform with the train slowly moving, is by a jerk thrown off and injured. *Secor v. Toledo, Peoria, & Warsaw Railroad Co.*, 10 Fed. Rep. 15. So where an announcement is made of a certain time for refreshments, and

passengers are getting out, the train should be permitted to stand still. *Sauter v. New York Central & Hudson River Railroad Co.*, 6 Hun, 446. But where the train has stood long enough to permit passengers to get out, and a passenger without fault of the company has failed to do so, the company will not be liable if he is injured in getting out by the starting of the train, the conductor not knowing and having no reason to suspect that he was doing so. *Straus v. Kansas City, St. Joseph, & Council Bluffs Railroad Co.*, 75 Mo. 185; *Hannibal & St. Joseph Railroad Co. v. Clotworthy*, 80 Mo. 220.

(f) See *Plopper v. New York Central & Hudson River Railroad Co.*, 13 Hun, 625. Railway companies are bound to provide platforms or safe places for passengers to alight, and leave them there, moving the train backward or forward at request of the passenger to enable him to step on to the platform. *Memphis & Charleston Railroad Co. v. Whitfield*, 44 Miss. 466. So, where the company having provided a proper landing-place and the passenger alights elsewhere, he cannot recover. *Chicago, Rock Island, & Pacific Railroad Co. v. Dingman*, 1 Brad. 162. And see *Robson v. Northeastern Railway Co.*,

10. It has recently been decided by the Court of Exchequer, KELLY, C. B., dissenting, that where the train, on arrival at the station, overshot the platform, by which it was requisite, in order to get out of the car, to make a descent of about three feet, and the plaintiffs (husband and wife), after waiting a short time and seeing no movement to run the cars back, or in any way enable them to remove from the car in any other way, made the descent, the husband first, and then the wife, standing on the iron step of the carriage and taking both the hands of her husband, jumped down, and in so doing sprained her knee, and the jury having found for the plaintiffs for £300, a new trial must be granted, on the ground that there was no evidence for the jury of negligence on the part of the defendants.¹⁰

¹⁰ *Siner v. Great Western Railway Co.*, Law Rep. 3 Exch. 150, affirmed in Exchequer Chamber, Law Rep. 4 Exch. 117. In *Bridges v. North London Railway Co.*, Law Rep. 5 C. P. 459, note, the train stopped while some of the carriages were still in a tunnel, which terminated at the station, and one of the porters calling out the name of the station, the deceased immediately got out in the dark, and fell on the rail and was killed by the train. It was held there could be no recovery, by reason of the contributory negligence of the deceased; which seems a very forced and unnatural construction, since the deceased did what most men would have done under the circumstances. Here such a case would have been submitted to the jury, a course which was refused by BLACKBURN, J., at the trial, and his decision was affirmed by the full court, and that judgment was affirmed in the Exchequer Chamber, Law Rep. 6 Q. B. 377. The same question has been further discussed in *Cockle v. London & Southeastern Railway Co.*, Law Rep. 5 C. P. 457. In this case the train came to a stand at the station, while some of the carriages were opposite an extension of the platform too remote for the passengers to reach it from the carriages; and the plaintiff, in attempting to step from the carriage to the platform, fell and was injured. There was evidence that the engineer was in fault, in not bringing all the carriages alongside of the platform, where there were lights, and where the passengers could alight safely. The court was equally divided on the question of negligence on the part of the company and the propriety of submitting that question to the jury. The principles involved are much the same as those in the next preceding. It seems a clear case for the consideration of a jury, under proper instructions in regard to the facts and circumstances involved. But see cases reported in notes to last case. The court was

Law Rep. 2 Q. B. 85. But see *Rose v. Northeastern Railway Co.*, Law Rep. 2 Exch. 248. It is not negligence *per se* to get off at the rear end of a car. *Cartwright v. Chicago & Grand Trunk Railway Co.*, 16 Am. & Eng. Railw. Cas. 321. *Memphis & Charleston Railroad Co. v. Whitfield*, 44 Miss. 466.

* 11. Chief Baron KELLY maintained, that the stopping of the train at the station, without any notice to the passengers not to get

nearly equally divided in *Bridges' Case* in the Exchequer Chamber; but they all agreed that calling the name of the station before the entire length of the train had reached the platform, was not in itself an invitation to the passengers to alight. Whether it is so or not must depend on the circumstances of each particular case. It seems to us that most of the late English cases named in this note have rather overstrained the presumptions and constructions in favor of the railways, in order to take them out of the hands of the jury, where they might possibly be in danger of too severe handling.

In *Columbus & Indiana Central Railroad Co. v. Farrell*, 81 Ind. 408, the rule of responsibility of the company seems to us to have been maintained in a far more salutary way. The train passed beyond the platform, and stopped on a culvert, and the proper servants of the company announced the name of the station as a warning to the passengers for that station to leave the train; and the plaintiff being one of the passengers for that station, and on account of the darkness of the night not knowing but the train had stopped at the platform, stepped out and was severely injured. It was held that the company was responsible. In *McDonald v. Chicago & Northwestern Railway Co.*, 26 Iowa, 124; s. c. 29 Iowa, 170, the rule of responsibility seems to have been carried to the utmost limit against the company. The train had stopped at a station for supper, and, after the passengers left, had been run back to the extreme limit of the platform, so as to be out of the way for the time, to be brought back whenever the passengers were ready to leave. The plaintiff's wife, finding the passenger-room overcrowded, and so filled with tobacco smoke as to be extremely uncomfortable, attempted to find her seat in the cars, and, in so doing, went to the end of the platform, and in passing down the steps, they gave way, and she suffered serious damage. It appeared that this portion of the platform had been in constant use by passengers in passing from one train to another, and that there was nothing to indicate to passengers that they could not safely enter the cars by this way, the company was held responsible, and, we are inclined to think, justly. The opinion of the court by DILLON, C. J., is an able commentary on the question; s. c. 2 Redf. Am. Railw. Cas. 523.

The case of *Cockle v. London & Southeastern Railway Co.*, *supra*, was affirmed in the Exchequer Chamber, Law Rep. 7 C. P. 321, and the judges seem to have been unanimous. It was decided a good deal on the authority of *Praeger v. Bristol & Exeter Railway Co.*, 24 Law T. Rep. n. s. 105, and found also in the opinion in *Cockle's case*, but not in the regular series of reports. The facts in the last case were very similar to those in *Cockle's case*. The platform curved away from the line of the rails, so that the back cars did not come up to it, and the night being dark, and there being no lights in that vicinity, when the train came to a stand and the porter opened the carriage door, the plaintiff alighted, expecting to step upon the platform, but fell between it and the carriages, and was seriously injured. The court held in both these cases, that passengers are justified in getting out of the carriages

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out, was an invitation to them to do so; the descent at that place was dangerous, but not so clearly so that the plaintiffs might not properly encounter the risk; and the company, having wrongfully put the passengers to the necessity of choosing between two alternatives, the inconvenience of being carried on and the danger of getting out, they were liable for the consequence of the choice, provided it were not exercised wantonly or unreasonably. And this seems to us exceedingly just and reasonable, and strictly in accordance with the doctrine of the case of *Foy v. London, Brighton, & South Coast Railway*,¹¹ the facts of which were very similar. We should be surprised if the views of the learned Chief Baron do not ultimately prevail in the appellate courts.

12. But since the foregoing was written, the report of the decision¹² in the Exchequer Chamber has come to hand, and the judgment has been affirmed, with only the dissenting opinion of Mr. Justice KEATING. The decision here seems to rest mainly upon the rashness or imprudence of the party injured in jumping from the cars, without requesting that they might be pushed back against the platform, or seeking some other mode of alighting, before jumping. It seems to us rather a lame case, and sufficiently apologetic toward railway companies, who leave passengers to get out of their carriages in the best way they can. If the company are to be excused when their carriages fall short, or when they overreach the platform at the station, and no effort is made to enable the passengers to alight from them in safety, and passengers are to take the consequences of any accidents occur-

when they come to a final stand, expecting to alight upon the platform; and that if that were not practicable, and there were no light to enable the passenger to discover the peril, it was the duty of the company to give warning to the passengers. See also *Gell v. Great Eastern Railway Co.*, 26 Law T. 879. It was decided in *Toledo, Wabash, & Western Railroad Co. v. Baddeley*, 54 Ill. 19, that passenger carriers by railway must allow a sufficient time for all passengers, young or old, with diligence to leave the carriages in safety; and if the time-tables do not allow that at any station, the company will be held responsible for all damages in consequence. But this rule will have no application to a passenger carried on a freight train, not advertised to stop at a particular station, and a passenger must exercise care in leaving the train under such circumstances, or he cannot recover for any damages he may sustain in consequence. *Chicago & Alton Railroad Co. v. Randolph*, 53 Ill. 510.

¹¹ 18 C. B. N. S. 225.

¹² 17 W. R. 417.

ring from their leaping out, when there is no other means of escape afforded, it comes, practically, very near saying, the company are not responsible for any deficiencies in their accommodations, whenever it is possible to conjecture any mode in which passengers might have escaped injury. We should be surprised to have any such rule of responsibility, on the part of passenger carriers, long prevail anywhere.

13. The true rule in such cases would seem to be, that where any arrangement connected with passenger transportation was admitted, by being afforded, to be a necessary convenience for the security or comfort of the passengers, it should be the duty of * carriers to afford it to all, as far as practicable, and if any injury occurred in consequence of their failure to do so, they should be held responsible, unless the party was in fault. This would ordinarily involve so many inquiries of fact as to require the case to be submitted to the jury. And the omission to do that seems to be the great ground of doubt in regard to the decision of the case now under consideration. We do not suppose much doubt will arise, upon this point, in the American courts; and we cannot but feel that the strictest and fairest construction of the rules of law requires a question of this character to be submitted to the jury, and therefore that the dissenting opinions in this case rest upon sounder views than those of the majority. And it was upon this ground, that we ventured to express a hope that the decision would not be maintained by the appellate courts. The case will probably reach the House of Lords, since the decision in the Exchequer Chamber fails to have the support of either of the Lord Chief Justices, and was dissented from in the first instance by the Lord Chief Baron of the Exchequer, and cannot, therefore, be regarded as of the fullest weight notwithstanding its authority.

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SECTION IV.

Injuries causing Death.

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| <ol style="list-style-type: none"> 1. Redress, in such cases, given exclusively by statute. 2. Form and extent of the remedy under the English statute. 3. Person injured being in fault, no recovery can be had. <i>Sed quære.</i> 4. Damages not allowed for mental suffering. Question pecuniary. 5. In Pennsylvania, damages measured by probable accumulations. 6. In Massachusetts, company subjected to fine not exceeding five thousand dollars. 7. But wife cannot maintain an action for death of husband or father, nor for death of child. 8. In Illinois, the personal representative | <ol style="list-style-type: none"> sues for the benefit of the widow and next of kin. Rule of damages. 9. Form of the indictment under Massachusetts statute. 10. If those having charge of passengers, not <i>sui juris</i>, leave them exposed, company not liable. 11. No action lies if death caused by neglect of fellow-servant or by machinery. 12. Servant liable for consequences of using defective machinery. 13. Compensation to the party bars claim of representatives. 14. Parents may recover for death of child of full age. 15. Statute of limitations. |
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§ 195. 1. Within the last few years, and chiefly it is presumed on account of the increased peril to life by railway travelling, it * has been provided by statute, in England and in most of the American states, that redress shall be given against the party causing a personal injury from which death ensues. (a) These acts, although intended chiefly to stimulate watchfulness and circumspection in passenger carriers, especially carriers by railways and steamboats, are, as was suitable, made general, and in some of the states the recovery is in the form of a penalty. It seems scarcely requisite to state here the familiar rule of law which prevailed both in England and this country before the passing of these statutes, that actions for personal wrongs died with the persons injured, according to the maxim, *actio personalis moritur cum persona*. (b)

(a) The remedy in such case is so wholly matter of statute that it is not deemed advisable to give here a statement of decisions upon more than the points as to which all such statutes in the main agree. For matters peculiar to the statutes of particular states

reference must of necessity be had to the statutes themselves and the decisions in construction thereof.

(b) Thus at common law a father cannot recover of a railway company for causing the death of his minor son. *Sullivan v. Union Pacific Rail-*

2. The English statute, usually denominated Lord Campbell's Act,¹ provides that when death shall be caused by wrongful act, neglect, or default, such as would (if death had not ensued) have entitled the party to an action, in every such case an action may be maintained by the executor or administrator of the party injured, and the jury may give such damages as shall be proportioned to the injury resulting from the death of the party, to his family, to be divided among the parties named in the act, as the jury shall direct. Only one action can be brought, and that is to be commenced within twelve months of the decease of the party injured.

3. It is considered, that if the party's own negligence contributed to the injury, the action will not lie, any more than if the party had survived and brought the action himself.² (c)

¹ Statute 9 & 10 Vict. c. 93. Where such remedy is given by statute in any of the states, the jurisdiction of the national courts to try actions under it between proper parties attaches, notwithstanding a provision in the statute that no action shall be brought except in the state courts. *Chicago & Northwestern Railway v. Whitton*, 13 Wal. 270. A railway company is liable for injuries resulting from the negligence, violence, or carelessness of its conductors in removing from the car a passenger who refused to pay his fare, in consequence of which he died. *Pennsylvania Railroad Co. v. Vandiver*, 42 Penn. St. 365.

² Lord DENMAN, in *Tucker v. Chaplin*, 2 Car. & K. 730.

So if the negligence of those who carry the plaintiff contributed to the injury, it is the same thing. *Thorogood v. Bryan*, 8 C. B. 115. Where the deceased was warned of his danger, it is presumptive, but not conclusive, evidence of negligence. *North Pennsylvania Railroad Co. v. Robinson*, 44 Penn. St. 175.

road Co., 2 Fed. Rep. 447; *Thomas v. Union Pacific Railroad Co.*, 1 Utah, 232. But otherwise under the civil law, and *semble* also in the admiralty. *Holmes v. Oregon & California Railway Co.*, 5 Fed. Rep. 75.

(c) But what seems, from some of the cases, to be a qualification of the usual rule obtains here. If the negligence of the company was gross, it may be liable, though the deceased was slightly negligent. *Chicago, Burlington & Quincy Railroad Co. v. Van Patten*, 74 Ill. 91. But see *contra*, *Karle v. Kansas City, St. Joseph, & Council Bluffs Railroad Co.*, 55 Mo. 476. And it seems that negligence of the parents of an infant so young as to be unable to exercise care, will defeat a recovery. *Toledo, Wabash, & Western Railway Co. v. Grable*, 88 Ill. 441. *s. p.* *Pennsylvania Railroad Co. v. James*, 81½ Penn. St. 194. It seems too, that where contributory negligence is a defence, the plaintiff must allege and prove that the decedent was guilty of no negligence. *Cincinnati & Martinsville Railroad Co. v. Eaton*, 53 Ind. 307; *Murphy v. Chicago, Rock Island, &*

4. It has been held that, under the English statute, no damages are recoverable for the mental sufferings of the survivors, who are, by the act, entitled to share the amount recovered, but that the damages must be limited to the injuries of which a pecuniary estimate can be made.³ (*d*)

³ *Blake v. Midland Railway Co.*, 18 Q. B. 93; s. c. 10 Eng. L. & Eq. 437; *Hodges Railw.* 624.

There seems no doubt, according to the best-considered cases in this country, that the mental anguish which is the natural result of the injury may be taken into account in estimating damages, although not of itself the foundation of an action. *Canning v. Williamstown*, 1 Cush. 451; *Morse v. Auburn & Syracuse Railroad Co.*, 10 Barb. 623. But it has been held, that, under the English statute, damages for the death of a person are not to be estimated according to the value of the life calculated by annuity tables, but should be a

Pacific Railroad Co., 45 Iowa, 661. See *Indianapolis & St. Louis Railroad Co. v. Stout*, 53 Ind. 143. And see *supra*, § 193, note (i).

(*d*) In a suit by a parent for the death of a child, recovery can be had only for the pecuniary injury, — services of child less cost of maintenance. *Pennsylvania Railroad Co. v. Lilly*, 73 Ind. 252; *St. Louis, Iron Mountain, & Southern Railway Co. v. Freeman*, 36 Ark. 41; *International & Great Northern Railroad Co. v. Kindred*, 57 Tex. 491; *Rockford, Rock Island, & St. Louis Railroad Co. v. Delaney*, 82 Ill. 198. See *Walters v. Chicago, Rock Island, & Pacific Railroad Co.*, 41 Iowa, 71. Including medical attendance, nursing, and expenses of burial, but not grief, loss of society, &c. *Little Rock & Fort Smith Railway Co. v. Barker*, 33 Ark. 350. See *Barley v. Chicago & Alton Railroad Co.* 4 Bissell, 430.

In estimating the damages no uniform or precise rule can be adopted. The jury must use a sound judgment on all the facts, and may consider relationship, age, amount of property, character of business, means employed, prospect of increase of wealth,

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&c. See *Kansas Pacific Railway Co. v. Cutter*, 19 Kan. 83; *Etherington v. Prospect Park & Coney Island Railroad Co.*, 88 N. Y. 641; *Keever v. Market Street Railroad Co.*, 59 Cal. 294; *Denver South Park & Pacific Railway Co. v. Woodward*, 4 Col. 1; *Baltimore & Ohio Railroad Co. v. Wightman*, 29 Grat. 431. Under the Tennessee statute compensation may be given for the pain and bodily and mental suffering of the decedent. *Nashville & Chattanooga Railroad Co. v. Stevens*, 9 Heisk. 12. As to who may recover and what may be considered in computing damages, see *Trafton v. Adams Express Co.*, 8 Lea Tenn. 96; *East Tennessee, Virginia, & Georgia Railroad Co.*, 10 Lea Tenn. 58; *Louisville & Nashville Railroad Co. v. Conley*, Ib. 531; *Schadewald v. Milwaukee, Lake Shore, & Western Railway Co.*, 55 Wis. 569; *Mitchell v. New York Central & Hudson River Railroad Co.*, 64 N. Y. 655; *Cregin v. Brooklyn Cross Town Railroad Co.*, 19 Hun, 341; *Baltimore & Ohio Railroad Co. v. State*, 41 Md. 268; *South & North Alabama Railroad Co.*, 59 Ala. 272.

* 5. In the American courts, the decisions in the different states will differ, as the statutes are different. The rule laid down in

reasonable compensation. *Armsworth v. Southeastern Railway Co.*, 11 Jur. 758. In this case, PARKER, B., instructed the jury that they were "to determine according to the ordinary rules of law, whether, if the deceased had been wounded by the accident, and were still living, he could recover compensation in the way of damages against the company for the wound given under the circumstances in evidence in the case," and estimate damages "on the same principle as if only a wound had been inflicted." The difficulties of laying down any rule in regard to damages in such cases is strikingly illustrated in an article in 18 *London Jurist*, pt. 2, 1, where the case is put of an accident by which "an archbishop, a lord chancellor, an East Indian director, a lunatic, a wealthy but immoral man, and one virtuous but a bankrupt," are killed, and the jury are imagined as attempting to determine "the pecuniary value of the parental care, protection, and assistance of each."

In *Bramhall v. Lee*, 29 Law T. 111, serious doubts are suggested whether an action will lie under the English statute to recover damages in the name of the administrator, for the death of an infant (so young as to be unable to earn anything), by way of compensation for the loss of the services of the child to the family. In *Dalton v. Southeastern Railway Co.*, 4 C. B. N. S. 296, it was held that the father might have an action under Lord Campbell's Act, 9 & 10 Vict. c. 93, for an injury resulting in the death of a son, twenty-seven years old and unmarried, who had been accustomed to make occasional presents to his parents, on account of the reasonable expectation of pecuniary profit from the continuance of his life. But it was held not competent for the jury to give by way of damages compensation for the expenses incurred by him for his son's funeral or for family mourning. Nor can damages be awarded as a *solatium*, or in respect of the loss of a legal right, but on the ground of a reasonable expectation of pecuniary advantage from the continuance of the life. It is not necessary that actual benefit should have been derived. Reasonable expectation of sensible and practical pecuniary benefit is sufficient. *Franklin v. Southeastern Railway Co.*, 3 H. & N. 211; s. c. 31 Law T. 154. But in the case of *Oldfield v. New York & Harlem Railroad Co.*, 3 E. D. Smith, 103, it is said that the New York statute, giving a right of action in this class of cases to the next of kin, does not limit the amount to be recovered to the loss of those only whose relations to the deceased gave them a legal right to some pecuniary benefit which would result from the continuance of the life. An action will lie in every such case under the statute where the deceased, had he survived, could have maintained one. The damages are not restricted to the actual pecuniary loss, but include present and prospective damages in the discretion of the jury. Accordingly, in the present action, brought for the benefit of the mother of an infant daughter seven years of age, killed in the streets of New York by one of defendants' cars being drawn over her, it was held that a verdict for thirteen hundred dollars did not justify the court in granting a new trial, the amount, although "large, not affording evidence of prejudice, partiality, or corruption." This case is affirmed in the Court of Appeals, 14

* Pennsylvania⁴ is, that the jury are to estimate damages "by the probable accumulations of a man of such age, habits, health, and * pursuits as the deceased, during what would probably have been his lifetime."

6. By the statute of Massachusetts,⁵ (e) passenger carriers, causing the death of any passenger through their own negligence

N. Y. 310, on the ground that the question of negligence was properly submitted to the jury, and that no proof of special or pecuniary damage was necessary in order to maintain the action. In *Fairchild v. California Stage Co.*, 13 Cal. 599, it is held that damages for pain of mind are recoverable.

⁴ *Pennsylvania Railroad Co. v. McCloskey*, 23 Penn. St. 526, 528; s. c. 2 Redf. Am. Railw. Cas. 466. The court say: "The jury must place a money value upon the life of a fellow-being very much as they would upon his health or reputation." In the trial of such an action it is proper for the judge in charging the jury to allude to the expectation of life at certain ages as determined by tables deduced from the bills of mortality. *Smith v. New York & Harlem Railroad Co.*, 6 Duer, 225; *Chicago v. Major*, 18 Ill. 349; *Paulmier v. Erie Railway Co.*, 5 Vroom, 151. The probable benefits of the continuance of the life of the father as to children is to be estimated with reference to majority; and as to the widow, with reference to the expectation of life as determined by the tables. *Baltimore & Ohio Railroad Co. v. State*, 33 Md. 542; *Macon & Western Railroad Co. v. Johnson*, 38 Ga. 409; *David v. Southwestern Railroad Co.*, 41 Ga. 228. It was held in *Wallace v. Connor*, 38 Ga. 199, in an action by the widow of an employé for the loss of her husband employed as an engineer on defendants' train, while transporting Confederate soldiers, that, as the business was illegal, there could be no recovery.

⁵ Statute of March 23, 1840. Proceedings under this act are not within the statute of limitations for actions and suits for penalties. *Commonwealth v. Boston & Worcester Railroad Co.*, 11 Cush. 512. It has been held that in proceedings under this statute it must be alleged that administration has been taken within the Commonwealth. *Commonwealth v. Sanford*, 12 Gray, 174.

(e) It is no defence to an indictment under the statutes of 1874, c. 372, § 163, that the passenger was not in the exercise of due care. *Commonwealth v. Boston & Lowell Railroad Co.*, 134 Mass. 211. That section applies when the company is using a track reasonably incident to its business, though not in its chartered limits nor under its control, but a private track used by mere sufferance. *Same v. Same*, 126 Mass. 61. As to plead-

ing and practice under the Mass. Statutes, see *Commonwealth v. Fitchburg Railroad Co.*, 120 Mass. 372; *Commonwealth v. Boston & Maine Railroad Co.*, 133 Mass. 383; *Commonwealth v. Fitchburg Railroad Co.*, 126 Mass. 472.

As to pleading, practice, &c., under the New Hampshire statute, see *State v. Boston & Maine Railroad Co.*, 58 N. H. 408, 510.

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or carelessness, or that of their servants or agents, within the Commonwealth, are subjected to a fine not exceeding five thousand dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, "for the benefit of his widow and heirs."

7. It was held that the wife cannot sustain an action for the death of her husband, under this act.⁶ Nor can the father sustain *such action for the loss of service of his child, by death.⁷ Nor in either of the last two cases will an action lie at common law. (f)

8. By the statute of Illinois the right of action in such cases is given to the personal representative, and the damages recovered are for the exclusive benefit of the widow and next of kin, and the jury are to give damages for the pecuniary injury to such parties. It was held not necessary to the recovery that the widow and next of kin should have had any legal claim upon the deceased for their support, if he had survived.⁸ It was here said by Mr.

⁶ *Carey v. Berkshire Railroad Co.*, 1 Cush. 475. And under the New York statute, giving an action to recover the pecuniary injury to the wife and next of kin, if there be no wife or next of kin no action will lie. The husband cannot recover damages for the death of the wife. *Lucas v. New York Central Railroad Co.*, 21 Barb. 245; *Worley v. Cincinnati, Hamilton, & Dayton Railroad Co.*, 1 Handy, 481.

⁷ *Skinner v. Housatonic Railroad Co.*, 1 Cush. 475.

⁸ *Illinois Central Railroad Co. v. Barron*, 5 Wal. 90; s. c. 2 Redf. Am. Railw. Cas. 471. And by the New York statute it is not requisite to the recovery that there should be "a widow and next of kin" surviving the deceased. *McMahon v. New York*, 33 N. Y. 642. The New York statute does not apply to a cause of action in tort accruing in a foreign state, and no action will lie thereon in New York when the death of the party ensues. *Crowley v. Panama Railroad Co.*, 30 Barb. 99. In *Baltimore & Ohio Railroad Co. v. State*, 24 Md. 271, the rule is thus stated. In an action for negligently causing the death of plaintiff's husband, an instruction that "in the absence of proof (other than the death, age, and condition of the deceased, and of the members of the family of the deceased) of actual damages, the jury could find only nominal damages," was held rightly refused. The jury were instructed to confine themselves to such damages as would afford to the family of the deceased the same support they would have obtained from his labor during

(f) And under Gen. Sts., c. 63, § 98, a fine is not recoverable for the death of a person, leaving no widow or children. *Commonwealth v. Boston & Albany Railroad Co.*, 121 Mass. 36.

passenger, killed by negligence, leav-

Justice NELSON, that the damages must depend very much upon the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case. Where the action is by the husband as administrator of his wife, where the damages are for the next of kin, the services of the wife and mother in the nurture and instruction of her children, had she survived, may properly be brought to the consideration of the jury by the judge in his charge,⁹ and the consideration is not necessarily to be restricted to the minority of the children.

9. In an indictment under this statute, it is not necessary to specify the names of the servants or agents guilty of the negligence, or the nature or manner of such negligence.¹⁰

* 10. The want of due care in the deceased which contributed directly to produce the injury, we have seen, will preclude the recovery of damages, under the statutes allowing actions to be

the time he would probably have lived and earned a livelihood, but that they might consider the age, health, and occupation of the deceased, and the comfort and support afforded to the family of the deceased at the time of his decease." This was held correct. The duty of passenger carriers extends to the safe landing of the passenger, and if killed in alighting from the carriage the carrier will be responsible. But a mother has no implied interest in the services of her minor child unless the relation of master and servant is shown to exist. *Fairmount Passenger Railway Co. v. Stutler*, 54 Penn. St. 375. The question of damages in such cases is here extensively discussed. See also on the same point, *Pennsylvania Railroad Co. v. Butler*, 57 Penn. St. 335, where it is said damages must be compensatory and not for solace. In actions of this kind, whether certain facts constitute negligence is commonly a question of law; but whether they contributed to the injury is a question of fact. *Catawissa Railroad Co. v. Armstrong*, 52 Penn. St. 282; *s. c.* 49 Penn. St. 186.

⁹ *Tilley v. Hudson River Railroad Co.*, 29 N. Y. 252.

¹⁰ *Commonwealth v. Boston & Worcester Railroad Co.*, 11 Cush. 512. In an action on the Massachusetts statute of 1842, c. 89, § 1, which provides that "the action of trespass on the case for damage to the person shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended, by or against his executors or administrators, in the same manner as if he were living," it was held that the right of action depended on the question, whether the testator, or intestate, lived after the act which constitutes the cause of action. *Hollenbeck v. Berkshire Railroad Co.*, 9 Cush. 481. See also *Mann v. Boston & Worcester Railroad Co.*, 9 Cush. 108. Where the party was by the injury rendered immediately insensible and died in fifteen minutes thereafter, the cause of action was held to survive to the personal representative. *Bancroft v. Boston & Worcester Railroad Co.*, 11 Allen, 34.

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maintained in those cases where the party does not survive the injury. So, also, in the case of persons incapable of taking care of themselves, if those who have the custody of them improperly expose them, and injury ensues causing death, the company are not liable, although guilty of negligence. Where a lunatic was travelling in the cars upon a railway, in charge of his father, who had paid the fare of himself and son through, and taken tickets, but who got out at a station to procure refreshments, leaving the son in the cars, without giving notice to any one of his situation, the train left the station before he returned. The conductor applied to the lunatic for his ticket, not knowing his condition or that his fare had been paid. The lunatic not surrendering his ticket, the conductor stopped the train and had him put out, where he was killed by another train. It was held, that no action could be maintained against the company, under the statute, the fault being upon the part of those who were responsible for the deceased, and not on that of the company or its agents.¹¹

* 11. Nor does an action lie, under these statutes, where the death is caused by the negligence of a fellow-servant, unless such servant was habitually careless and unskilful, or if produced in the use of defective machinery, which the deceased knew to be unsafe.¹² Nor where the death is caused by defective machinery, or through defect of fences, if the servant knew of the defect and made no remonstrance.¹³

12. And it has even been considered in such case, that the servant, being an engineer, would be liable to any person injured by such defect.¹³

¹¹ *Willets v. New York & Erie Railway Co.*, 14 Barb. 585. See also *Hibbard v. New York & Erie Railway Co.*, 15 N. Y. 455. But the admissions of a deceased husband against the interests of the wife, in an action for personal injury to her, brought after the death of the husband in her own name, such admissions being made after the alleged injury occurred, and while the husband, had a suit been instituted, must have been joined, are nevertheless inadmissible, on the ground that the husband is not the real but only a nominal or formal party. *Shaw v. Boston & Worcester Railroad Co.*, 8 Gray, 45; *supra*, § 192.

¹² *Hubgh v. New Orleans & Carrollton Railroad Co.*, 6 La. An. 495. See *supra*, § 131, notes 2, 12, 15; *Timmons v. Central Ohio Railroad Co.*, 6 Ohio St. 105. But if the servant object to the use of machinery, as unsafe, and it is still used, whereby he loses his life, damages may be recovered under the statute. *Marshall v. Stewart*, 2 Macq. Ap. Cas. 30; s. c. 33 Eng. L. & Eq. 1.

¹³ *McMillan v. Saratoga & Washington Railroad Co.*, 20 Barb. 449. It is

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13. Where the deceased in his lifetime received a sum of money in satisfaction of the injury, his subsequent death in consequence of the injury creates no new cause of action.¹⁴

14. Where the deceased was over twenty-one years old, but having made arrangements to become a substitute for a drafted man had declared his intention of giving his bounty to his parents, and was killed on his way to be mustered into the service, it was held that these facts were proper evidence to show the continuance of the family relation, and to found an action by his parents.¹⁵

15. The statute of limitations will not begin to run until the cause of action is complete, which embraces the negligence, the injury, and consequent death.¹⁶

here said, the servant may require special indemnity against all risks, or he may give notice, and throw the risk on the company. See *Slattery v. Toledo & Wabash Railway Co.*, 28 Ind. 81, where it is held, that a brakeman on a train and one whose duty and business it is to attend a switch, are engaged in the same general undertaking, and that the company is not liable to one for an injury caused by the negligence of the other. The complaint stated in substance that A. was brakeman on a freight train of defendants, and was killed by the cars being thrown off the track by the breaking of a switch-pin, which the company and its servants, knowing it was insecure, had carelessly left out of repair for twelve days previous. There was no switch-tender, and the whole care of the switch, and everything pertaining to its security, were under the control of the section-agent and his hands, who had nothing to do with running the trains. It was held, that in the absence of an averment that the company was negligent in employing an incompetent section-agent, the complaint did not sufficiently state a case of negligence.

¹⁴ *Read v. Great Eastern Railway Co.*, Law Rep. 3 Q. B. 555.

¹⁵ *Pennsylvania Railroad Co. v. Adams*, 55 Penn. St. 499.

¹⁶ *Andrews v. Hartford & New Haven Railroad Co.*, 34 Conn. 57. Questions of pleading and evidence in such actions are discussed in *Pennsylvania Railroad Co. v. Henderson*, 51 Penn. St. 315.

•SECTION V.

Suits where the Injured Party is a Married Woman.

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| <p>1. Suit by husband for injury to wife, recovery of the expense of cure.</p> <p>a. (a). Recovery also for loss to children of care and training.</p> | <p>2. But expense of cure cannot be recovered in a suit on behalf of the wife for personal injuries.</p> |
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§ 196. 1. For injuries to a married woman through the negligence of railways as passenger-carriers, the husband may recover for expenses of the cure and the loss of service,¹ (a) and in one case it was held to extend to funeral expenses as well as medical attendance, where the wife did not recover; but if death be instantaneous, no action lies at common law.²

2. But in a suit in the name of husband and wife, where the wife survives, a recovery cannot be had for the expenses of cure.³ In such action recovery can only be had for the personal injury and sufferings of the wife. The action in such case, for the loss of service and of the society of the wife, and for the expenses of the cure, must be brought in the name of the husband alone,⁴ unless where they have been charged upon the separate estate of the wife.⁵

¹ Pack v. New York, 3 Comst. 489. And see Ford v. Monroe, 20 Wend. 210, where it is held that the father may recover for the killing of his child, and for medical attendance on his wife, the mother, caused by the death of the child.

² Eden v. Lexington & Frankfort Railroad Co., 14 B. Monr. 204.

³ Fuller v. Naugatuck Railroad Co., 21 Conn. 557.

⁴ Cases cited *supra*, notes 1, 2, 3.

⁵ Moody v. Osgood, 50 Barb. 628.

(a) So he may for loss to children of care and moral training. *St. Lawrence & Ottawa Railroad Co. v. Lett*, 11 Sup. Ct. Can. 454.

*SECTION VI.

Liability where Trains do not arrive on Time.

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| <ol style="list-style-type: none"> 1. Companies bound to deliver passenger according to contract. a. (a). Bound, in general, to run trains according to schedule. 2. Unless they are excused by special notice. 3. Liable for damages caused by discontinuance of train. 4. Carriers not performing according to previous notice liable to persons injured, as for breach of duty. | <ol style="list-style-type: none"> 5. Company not liable for injury caused by stage company, advertised to run in connection with railway. 6. Company excused, by giving proper notice of the course of its trains and the places of changing cars. 7. Rule of evidence and of estimating damages in such cases. 8. To recover special damages, passenger must show clearly that they occurred, and that he could not prevent them. |
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§ 197. 1. It would seem, upon general principles, that railways should be liable for not delivering passengers within the stipulated time as much as for not delivering goods according to their undertaking, unless they can show that such contract is subject to some exception which existed in the particular case. And in the county courts in England, it is said, such actions have repeatedly been maintained.¹ (a)

¹ Hodges Railw. 619. It was held in 19 Law Rep. 379, in the United States Circuit Court, September, 1856, before NELSON, J., that where one sold tickets to carry passengers from port to port, and stipulated that the ship should leave in a certain month, he must run all hazards of wind and weather, and could not excuse himself on account of any accidental or providential occurrence of that kind, having made no such exception in his contract.

(a) When the company fails to run train according to published schedule, it is liable to a person thereby injured, for damages actually sustained as the direct and necessary result thereof, unless there is some valid excuse. *Savannah Railroad Co. v. Bonand*, 58 Ga. 180. And see *Houston & Texas Central Railroad Co. v. Rand*, 9 Am. & Eng. Railw. Cas. 399. And at flag stations, train-men must be on the alert and stop at the signal. *Morse v. Duncan*, 8 Am. & Eng. Railw. Cas. 374. But where by the rules of the company a train does not stop at a station, a passenger who by his own fault has taken that train, cannot maintain an action for failure to stop. *Beauchamp v. International & Great Northern Railway Co.*, 56 Tex. 239; *Ohio & Mississippi Railway Co. v. Applewhite*, 52 Ind. 540; *Pittsburg, Cincinnati, & St. Louis Railway Co. v. Nuzum*, 50 Ind. 141. The failure of connections through delay of a train does not authorize the passenger to hire a special train at the expense of the carrier, where there is no special

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2. But if the company give proper notice, that they will not be responsible for the arrival of their trains in time, it would seem they are not liable for any necessary delay.

3. But where they advertise to run trains in a given mode, they are liable for any injury, which one who took an excursion ticket sustained by not finding a return train on the day it was advertised, he having returned by express, and sued the company for the expense.²

² *Hawcroft v. Great Northern Railway Co.*, 16 Jur. 196; s. c. 8 Eng. L. & Eq. 362. See also *Denton v. Great Northern Railway Co.*, 5 Ellis & B. 860; s. c. 34 Eng. L. & Eq. 154, where it is held that a railway company, continuing to advertise on its time-tables that a train will leave a station at a certain hour, and arrive at a point beyond its line at a certain hour, after this connecting train and by consequence its own train of that hour is discontinued, whereby one suffers pecuniary loss in not being able to proceed by such train, is liable to an action for such injury. But in *Hamlin v. Great Northern Railway Co.*, 1 H. & N. 408; s. c. 38 Eng. L. & Eq. 335, the plaintiff took passage in a train, which was advertised to go through to his destination the same night by connecting with the trains of another company, but on arriving at the point of connection, it turned out that the other train had left. The plaintiff might have accomplished his journey that night, by taking a special conveyance, but he slept at a hotel, and proceeded the next morning by the public conveyance. He arrived too late to meet his customers according to appointment, and was obliged to hire conveyances to see some of them elsewhere, and was detained several days, waiting for the market days, to see others. It was held that he was entitled to recover his hotel expenses, and the additional fare only, and not to recover for damage in consequence of not reaching his destination, according to defendants' undertaking. This case seems to have taken an extreme view of the rule of damages. The very least the defendants could have expected to pay was the expense of a special conveyance through that night. The rule here adopted seems to be almost equivalent to a denial of redress in such cases. For it is scarcely to be supposed that actions would be brought to recover such insignificant damages. It is quite conceivable that one might suffer very serious loss in consequence of such a failure to arrive in time, and if an action is maintainable, it should not be made a terror by attaching to it a rule of damages which will render it as expensive to the plaintiff as to the defendant, who is solely in fault. It seems also at variance with some former decisions in the English courts. See cases

necessity. *Le Blanche v. London & Northwestern Railway Co.*, Law Rep. 1 C. P. 286. As to measure of damages and circumstances under which punitive damages will be allowed, see *Memphis & Charleston Railroad Co. v. Green*, 52 Miss. 779. And see *Indianapolis, Bloomington, & Western Railway Co. v. Birney*, 71 Ill. 391.

* 4. And it has been said, that the liability of a passenger carrier for not stopping at a certain place and taking passengers, according * to public announcements made known through the public prints or in writing, is one founded upon a tortious violation of a general duty, and not upon any breach of special contract. And the courts, from the general facts alleged in the declaration, will put such a construction upon the plaintiff's claim as is consistent with the facts and the legal duty resulting from established legal principles.³ Common carriers of passengers who write to the postmaster to give notice of the arrival of their boat upon a certain day thereafter named, and who do not stop at the place upon the day appointed, are guilty of a breach of public duty, and any one suffering loss thereby may have an action. And if such letter is equivocal, it is competent to show by evidence *aliunde*, as by the circumstances under which the letter was written, and the business in which the company were employed, that it had reference to coming to the place named, for passengers on the day appointed.⁴

supra. It can hardly be that this rule will be followed ultimately in the English courts.

No question is made as to the special damage not being specifically declared for. Had that question been made, there might have been some ground for saying that it did not come within the general averments of the declaration, which is the only ground on which it seems that the case can be made to stand with the earlier English cases. *Hutchinson v. Granger*, 13 Vt. 386; *supra*, § 131, note 15. In the later case of *Randall v. Raper*, Ellis, B. & E. 84; s. c. 31 Law T. 81, the defendant sold the plaintiff a spurious article, warranted as "chevalier seed barley." The plaintiff resold to others with similar warranty. The seed was sour, and very inferior crops were grown. The sub-purchasers made claims upon the plaintiff for breach of warranty, but brought no actions, nor had the plaintiff paid anything at the time of trial. It was held that the plaintiff could recover such sum as the jury thought reasonable to indemnify him against the claims of sub-purchasers. This seems a more reasonable rule of damages than some of the preceding. But where the sale on warranty and consequent responsibility for damages is not in the contemplation of the parties at the time of the first sale, no such damage could be recovered. *Portman v. Middleton*, 4 C. B. n. s. 322. So too where a railway company sold packages of tickets, which were purchased in faith of the trains continuing to run as they then did, it was held responsible for damage accruing by reason of the change of the time-tables, without giving such purchasers any notice of the change except by posting notices in the cars and at the stations. *Sears v. Eastern Railroad Co.*, 14 Allen, 433.

³ *Heirn v. M'Caughan*, 32 Miss. 17; *New Orleans, Jackson, & Great Northern Railroad Co. v. Hurts*, 36 Miss. 660.

⁴ *Heirn v. M'Caughan*, *supra*.

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* 5. But the company, advertising that stages will run from their stations to other places off the line of the railway, and selling tickets at their stations for such places, that is, to carry upon the railway to the nearest stations and then by stage, will not render the company liable for any injury to such passenger upon the stage, after he leaves the railway, the company having no ownership or interest in the stages. This does not constitute a special contract to carry as far as the ticket reaches.⁵ But the facts are certainly very analogous to many cases, where a special contract has been held to exist in regard to carrying goods beyond the line of the carrier to whom first delivered.⁶

6. Where the company give such published notice of the running of their trains, and such special notice in the cars of the necessity of changing cars at any particular station, that any traveller of ordinary intelligence, by the use of proper care, would be in no danger of mistaking his route, it will not be liable where passengers mistake the place of changing cars, and by remaining in the same car are carried out of their intended route.⁷

7. In an action against passenger carriers for not furnishing suitable accommodations, for delay and detention on the route, and for expense of injury and illness caused thereby in an unhealthy climate, it was held unobjectionable for the judge to admit evidence of how much the plaintiff was exposed to the sun and rain, and the nature of the climate, in order to enable the jury to determine how far the plaintiff's illness was caused by the defendant's negligence. And that in estimating the damages it was proper for them to consider the time the plaintiff lost by the illness, his expenses caused thereby, not only before but after his return home, so far as it resulted from the defendant's fault.⁸

⁵ Hood v. New York & New Haven Railroad Co., 22 Conn. 1.

⁶ *Supra*, § 180. But in Connecticut it has been held, that such a contract by a railway company is *ultra vires*. *Supra*, § 181.

⁷ Page v. New York Central Railroad Co., 6 Duer, 523. If the passenger in such case, having discovered the mistake in season to return and take the proper route, is permitted to do so without charge, but refuses to leave the cars, or pay his fare on the route he is travelling, he may be expelled from the cars.

⁸ Williams v. Vanderbilt, 28 N. Y. 217. This was an action to recover damages for the failure of the defendant to carry the plaintiff from New York to San Francisco *via* Lake Nicaragua, according to his agreement; for neglect of duty in not providing suitable accommodations, &c.; for delay and deten-

And * the plaintiff may prove his skill as a bookkeeper, and by parity of reason, in any other profession, to enable the jury to estimate his loss.⁹

8. In order to enable the plaintiff to recover special damages claimed to have been sustained by reason of the failure of the defendant to perform promptly, and according to its terms, a contract to carry him as a passenger, it must appear clearly, and by affirmative proof, that the damages were sustained, without any fault on his part, and in spite of his utmost efforts to avoid them.¹⁰

tion on the route, and for sickness caused by unnecessary detention in an unhealthy climate, &c. It was held that it was entirely proper for the judge to receive evidence as to how much the plaintiff was exposed to the sun and rain while crossing the Isthmus, and to show that the climate there was bad and unhealthy, so that the jury could determine whether the plaintiff's sickness was caused by defendant's negligence and breach of duty; also that the time the plaintiff lost by reason of his detention on the Isthmus, his expenses there and of his return to New York, the time he lost by reason of sickness after his return to New York, and the expenses of such sickness, so far as the same were caused by defendant's negligence or breach of duty, were legitimate matter of damages.

⁹ *Yonge v. Pacific Mail Steamship Co.*, 1 Cal. 353.

¹⁰ *Benson v. New Jersey Railway & Transportation Co.*, 9 Bosw. 412. It was there held that in an action for a failure of the defendant to carry the plaintiff within the appointed time, to the place for which he had taken passage, by reason whereof he did not perform his errand there, and was detained at expense and to the injury of his business at home, the plaintiff must produce some evidence that if he had arrived at the appointed time he could have done his business and would have promptly returned, or that he could not, with due effort, accomplish his errand by reason of the delay in arriving; that the plaintiff could not recover for his expenses and the damages to his business during a sojourn of several days, without some proof as to the time when he first ascertained that he could not accomplish his errand, and might therefore return; that the fact that his errand was to receive a sum of money previously promised him as a loan, and that, not receiving it, he was without means to return until he received it, is not sufficient to excuse his delay, if he made no effort to borrow, and does not show that there was a difficulty in the way of his doing so.

*SECTION VII.

What will excuse Company from Carrying Passengers.

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| 1. Company not bound to carry where carriages are full.
<i>n.</i> (a). But must not discriminate between passengers.
2. Must carry according to advertised terms.
3. Not bound to carry disorderly persons, or persons otherwise offensive. | 4. Carrier liable in tort for breach of duty as well as in an appropriate action for breach of contract.
5. Purchase of ticket does not constitute an absolute contract.
6. Company has a right to impose reasonable regulations as to carriage of passengers. |
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§ 198. 1. It would seem, upon general principles, that railway companies might excuse themselves from carrying passengers beyond their present means, if they were adequate to all ordinary occasions, and they had no reason to expect an increased press of travel at that particular time. But it should undoubtedly be an extreme case to justify an absolute refusal to carry a passenger, since it could scarcely be supposed ever to occur, that a railway, in any sense properly equipped for the purpose of carrying passengers and freight, should not be able to meet all emergencies in some way. And if the occasion were unusual, it might excuse some discomfort in the mode of conveyance. (a)

2. But it is said by PATTESON, J., in one case, where the company had issued an excursion ticket, stipulating to run trains in a given mode, that they could not excuse themselves, by showing the carriages were all filled.¹ The learned judge said: "They

¹ *Hawcroft v. Great Northern Railway Co.*, 16 Jur. 196; s. c. 8 Eng. L. & Eq. 362. In regard to the general duty and liability of common carriers of passengers, or those who held themselves out as such, see *supra*, § 192. It is said to have been held by some court, in the case of *Foland v. Hudson River Railroad Co.*, that a passenger who is not furnished with a seat is not obliged to pay fare, and if he is expelled from the cars for refusing such payment may sustain an action against the company. Such a rule must require much qualification. If the passenger is not accommodated in a manner which he deems a fair compliance with the duty of the company as passenger-carriers, he may decline any compromise and resort to his action against the company

(a) A company cannot discriminate between passengers, selling tickets to some and refusing to sell to others. *Indianapolis, Peru, & Chicago Railway Co. v. Rinard*, 46 Ind. 293.

* should have made it a condition of their contract, that they would not carry unless there was room." By the by-laws established by the Board of Trade in regard to railways in England, every passenger is required to book his place and pay his fare when he receives his ticket, and this is subject to the condition that there shall be room in the train for which he is booked. If not, those booked for the greatest distance have the preference.²

3. But it has never been considered in this country, that passenger carriers in any mode were bound to receive passengers who refused to conform to their reasonable regulations, or were not of quiet and peaceful behavior, or for any reason not fit associates for the other passengers, as if infected by contagion, or in any way offensive in person or conduct.³ (b) But where the carrier of passengers has no reasonable excuse, he is bound ordinarily to carry all that offer.⁴ And this has been regarded as a duty

for refusing to carry him as the contract or the company's duty required. And he might, no doubt, sustain such action, unless the company proved some just excuse. But if he chooses to accept of a passage without a seat, the general understanding undoubtedly is, that he must pay fare. But if he goes on to the cars expecting proper accommodations, and is put off because he declines going in that mode, he may still resort to his action.

² Hodges Railw., 553; *supra*, § 26, note 10.

³ Jencks v. Coleman, 2 Sumner, 221; Markham v. Brown, 8 N. H. 523. In these cases the persons excluded were in the interest of rival lines of carriers, and at the time engaged in the promotion of such interests.

⁴ Hollister v. Nowlen, 19 Wend. 239; s. c. 2 Redf. Am. Railw. Cas. 96. Bennett v. Dutton, 10 N. H. 486; where the subject is very elaborately dis-

(b) A person, e. g., so intoxicated as to be disgusting, offensive, disagreeable, or annoying. And it makes no difference that the person has purchased a ticket. Pittsburg, Cincinnati, & St. Louis Railway Co. v. Vandyne, 57 Ind. 576. But otherwise where the intoxication is so slight as not seriously to affect the person's conduct. *Ib.* And gamblers whose purpose in travelling is to ply their vocation, may be excluded. Thurston v. Union Pacific Railroad Co., 4 Dillon, 321. And not only so, the carrier is bound *not* to take persons manifestly intoxicated and quarrel-

some. Hendricks v. Sixth Avenue Railroad Co., 44 N. Y. Superior Ct. 8. And if any such person be taken and insult or injury be threatened to other passengers, the offending person should be ejected, if necessary, even if the train be stopped and train-men and other passengers be called on to assist for that purpose. New Orleans, St. Louis, & Chicago Railroad Co. v. Burke, 53 Miss. 200. And see King v. Ohio & Mississippi Railroad Co., 18 Am. & Eng. Railw. Cas. 386; Atchison, Topeka, & Santa Fe Railroad Co. v. Weber, 21 Am. & Eng. Railw. Cas. 418. See further, *infra*, § 203.

growing out of the employment of common carriers of passengers, and altogether independent of the contract between the parties, but which may undoubtedly be controlled by contract.⁵

4. The liability of a common carrier results from his duty to carry all freight and passengers which offer, within the range of his usual business, and he is liable in tort both in form and in substance as for a breach of duty, aside from and independent of all express or implied contract.⁶

5. The mere purchase of a ticket for a railway journey does not amount to an absolute contract on the part of the company, or impose upon the company a duty to have a train ready to start at the very time the passenger is led to expect one.⁷ (c)

*6. And a railway company have the right to prescribe reasonable conditions for the admission of any passengers on their freight trains; and the payment of fare to its office agents, or

cussed by PARKER, C. J. *Galena & Chicago Railroad Co. v. Yarwood*, 15 Ill. 472.

⁵ *Bretherton v. Wood*, 3 Brod. & B. 54; s. c. 9 Price, 408.

⁶ *Tattan v. Great Western Railway Co.*, 2 Ellis & E. 844. But a master cannot recover of the company for the loss of service of his servant when the servant purchased the ticket. *Alton v. Midland Railway Co.*, 19 C. B. n. s. 213; s. c. 11 Jur. n. s. 672.

⁷ *Hurst v. Great Western Railway Co.*, 19 C. B. n. s. 310; s. c. 11 Jur. n. s. 730. Here the trains did not connect because the train on the first portion of the line was delayed, and the passenger was thereby put to expense in staying over night, and it was held that there was no absolute contract to make the connection, and the passenger must run the risk of reasonable contingencies. The time-bills here were not put in the case, and the court held that the ticket alone only bound the company to carry the passenger through in a reasonable time. The time-bills will bind the company to their fulfillment. *Supra*, § 197, note 2. One was held to have become a passenger by being allowed by the agents of the company to attach his private car. *Lackawanna & Bloomsburg Railroad Co. v. Chenewith*, 52 Penn. St. 382. But where the company states in its bills that all reasonable effort will be made to have trains arrive as advertised, but punctuality will not be guaranteed, and the jury find the company guilty of no negligence, the passenger cannot recover for any failure to arrive in the time named in the bills and time-table. *Prevost v. Great Eastern Railway Co.*, 13 Law T. n. s. 20.

(c) The ticket is not a contract. passenger, however, with all that the It is a receipt merely. *Logan v. relation implies. Wabash, St. Louis, Hannibal & St. Joseph Railway Co., & Pacific Railway Co. v. Rector*, 104 12 Am. & Eng. Railw. Cas. 141. It Ill. 296. creates the relation of carrier and

procuring a ticket before taking passage on such trains, is not an unreasonable condition.⁸ An offer to pay fare to an employé on the train, not authorized to receive it, is not an offer to the company, and in such cases does not entitle the party to a place on such train as a passenger.⁸ And when a person has purchased a ticket and taken his passage on a train, and given up his ticket to the conductor, he cannot at an intermediate station, by virtue of his subsisting contract, leave such train, while in the reasonable performance of the contract, and claim a seat upon another train.⁸

* SECTION VIII.

Rule of Damages for Injuries to Passengers.

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| <ol style="list-style-type: none"> 1. All damage, present and prospective, recoverable. 2. But it should be obvious, and not merely speculative or conjectural. 3. New trials granted where damages awarded are excessive. 4. But this only in extreme cases.
n. (c). So a new trial may be had where the damages awarded are so small that it is clear some element of damage was omitted. 5. Counsel fees not to be considered. 6, 7. Passenger may have damages as compensation for pain. 8, 16. Passenger may prove nature of | <ol style="list-style-type: none"> business, value of his services in conducting, &c. 9. Damages, in general, rest very much in discretion of jury. 10, 17. In actions for loss of service, mental anguish not an element. 11. Woman claiming damages for personal injury, cannot prove state of her family or death of husband. 12. Refusal of court to set aside verdict for excessive damages. 13, 14. Right to any damage, question of law; the amount, question of fact. 15. Special damages cannot be recovered unless alleged and proved. |
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§ 199. 1. The question of damages is one resting a good deal in the discretion of a jury, and must of necessity be more or less uncertain. But certain general rules have been established upon the subject. It is settled that the party must recover all his damages, present and prospective, in one action.¹ (a)

⁸ Cleveland, Columbus, & Cincinnati Railroad Co. v. Bartram, 11 Ohio St. 457.

¹ Hodsoll v. Stallebrass, 11 A. & E. 301; Whitney v. Clarendon, 18 Vt. 252; Curtis v. Rochester & Syracuse Railroad Co., 20 Barb. 282; Black v. Carrollton Railroad Co., 10 La. An. 38.

(a) As to what will bar a second suit, see Leggott v. Great Northern Railway Co., Law Rep. 1 Q. B. 599.

2. But in another case,³ (b) it was said by the court, "It was certainly proper for the jury, in estimating the damages to the

³ *Curtis v. Rochester & Syracuse Railroad Co.*, 20 Barb. 282. See also *Morse v. Auburn & Syracuse Railroad Co.*, 10 Barb. 621. In *Hopkins v. Atlantic & St. Lawrence Railroad Co.*, 36 N. H. 9, it was held, that in an action by the husband for an injury to the wife, through the negligence of the company, the plaintiff may give evidence of expense of cure and loss of services, after the commencement of the action, as well as before; and that the jury may give prospective damages and exemplary damages, in their discretion, where the injury was caused by the gross negligence of the company in the management of trains. And in *Toledo, Wabash, & Western Railroad Co. v. Baddeley*, 54 Ill. 19, it was held competent, on a question of damages for injury to a passenger, for the plaintiff to prove by his attending physician the probable effect of the injury on his future condition, and on his mind in particular, although there was no allegation that the defendant's conduct was wilful. See *Illinois Central Railroad Co. v. Sutton*, 53 Ill. 397.

(b) The jury may consider loss through inability of the injured person to continue a lucrative professional practice. *Phillips v. London & Southwestern Railway Co.*, Law Rep. 5 C. P. 280; *Phillips v. Southwestern Railway Co.*, Law Rep. 4 Q. B. 406. And see *Nash v. Sharpe*, 19 Hun, 365. But they may not give damages for loss of merely speculative profits. *Pennsylvania Railroad Co. v. Dale*, 76 Penn. St. 47. Nor for loss of profits arising from his peculiar mode of doing business. *Phyfe v. Manhattan Railway Co.*, 30 Hun, 377. Nor for a loss arising from a failure during the plaintiff's confinement to sell gold locked in a safe, of which he alone had the combination. *Ib.* Nor for disease resulting from imprudently walking in the rain on being set down from a wrong train at a station a long distance from home; and this, though it was in the night and the plaintiff was unable to get conveyance or accommodation at an inn. *Hobbs v. London & Southwestern Railway Co.*, Law Rep. 10 Q. B. 111. But see *Cincinnati, Hamilton, & Indianapolis*

Railroad Co. v. Eaton, 94 Ind. 474; and see *Louisville & Nashville Railroad Co. v. Fleming*, 18 Am. & Eng. Railw. Cas. 347. Nor for sickness resulting from suppression of menses, caused by the negligent firing of the car and the driving out of the plaintiff half clad; for though persons have a right to travel when ill, they cannot throw upon the carrier the increased risk. *Pullman Palace Car Co. v. Barker*, 4 Col. 344. And see *Brown v. Hannibal & St. Joseph Railroad Co.*, 66 Mo. 588. But otherwise as to suffering caused by disease, the result of the injury. *Houston & Texas Central Railway Co. v. Leslie*, 57 Tex. 83. Nor may the jury consider in reduction of damages that the plaintiff has received money on an accident insurance policy. *Baltimore & Ohio Railroad Co. v. Wightman*, 29 Grat. 431; *Bradburn v. Great Western Railway Co.*, Law Rep. 10 Exch. 1. Nor can they consider the salary of the injured person during the period of disability. *Ohio & Mississippi Railway Co. v. Dickerson*, 59 Ind. 817.

The matter of exemplary damages

plaintiff, to regard the effect of the injury in future upon her health, the use of her limbs, her ability to labor and attend to her affairs, and generally to pursue the course of life she might otherwise *have done," and its effect in producing bodily pain and suffering, but all these should be "the legal, direct, and necessary results of the injury, and those which at the time of the trial were prospective should not be conjectural."

3. Courts will sometimes grant new trials for excessive damages in such cases, as where the statute limited the amount of recovery in case of death to \$5,000, and the jury assessed damages in a case of injury, not resulting in death, at \$11,000, the court ordered a new trial, unless the excess above \$5,000 should be remitted in twenty days.³(c)

* Collins v. Albany & Schenectady Railroad Co., 12 Barb. 402. So where six thousand dollars was awarded for a broken leg, of which the party recovered in about eight months, a new trial was granted. Clapp v. Hudson River Railroad Co., 19 Barb. 461. But where the plaintiff had been disabled for two years, and the injury seemed likely to be permanent, four thousand five hundred dollars was held not exorbitant. Curtis v. Rochester & Syracuse Railroad Co., 20 Barb. 282. And where the plaintiff was wrongfully expelled from the cars, between regular stations, and the jury gave a thousand dollars damages, a new trial was granted on the ground that they were excessive, no special damage being shown. Chicago, Burlington, & Quincy Railroad Co. v. Parks, 18 Ill. 460; *infra*, § 203.

has been to some extent regulated by statute, and the decisions are not in entire harmony. The Supreme Court of the United States has held that such damages should not be awarded for injuries received in collisions, unless caused by wilful misconduct or a reckless indifference equivalent thereto. Milwaukee & St. Paul Railway Co. v. Arms, 91 U. S. 489; Western Union Telegraph Co. v. Eyser, 91 U. S. 495. But by the courts of Kentucky, on the other hand, it has been held that the want of slight care is gross negligence, rendering the company liable for exemplary damages. Maysville & Lexington Railroad Co. v. Herrick, 13 Bush, 122. See Malecek v. Tower

Grove & Lafayette Railway Co., 57 Mo. 17; Brooks v. New York & Greenwood Lake Railroad Co., 30 Hun, 47; Kansas Pacific Railway Co. v. Cutter, 19 Kan. 83; Chicago, St. Louis, & New Orleans Railroad Co. v. Scurr, 59 Miss. 456. As to exemplary damages for wrongful expulsion of passenger from a train, see *infra*, § 203.

(c) A verdict for \$35,500 for personal injuries set aside as excessive. Louisville & Nashville Railroad Co. v. Fox, 11 Bush, 496. So was a verdict for \$14,833 for a broken leg resulting in permanent injury and deprivation of employment, the plaintiff being twenty-one years old, and earning from \$50 to \$75 a month. So was a verdict for \$1,500 for putting

4. The rule laid down by KENT, C. J., as justifying a new trial for excessive damages, is, that they should be so excessive "as to strike all mankind, at first blush, as beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, corruption, or prejudice."⁴ This is no doubt a safe rule, and perhaps the only safe one in such cases, but there are probably many cases where new trials have been granted for this cause, falling far short of this in excessiveness.

5. In some of the American states, in trials at *Nisi Prius*, in conformity with a single English case, the plaintiff has been allowed to add to his actual damages of loss of time, expense of cure, pain, and suffering, and prospective disability, if any,—counsel fees not recoverable by way of taxable costs.⁵ But this does not seem to be countenanced by the English courts in the later decisions.⁶

*6. In a recent English case, a distinguished judge, Chief Baron POLLOCK, says: "A jury must certainly have a right to give compensation for bodily suffering unintentionally inflicted. But when I was at the bar I never made a claim in respect of it,

⁴ *Coleman v. Southwick*, 9 Johns. 45. See also *Southwick v. Stevens*, 10 Johns. 443.

⁵ SHAW, C. J., in *Barnard v. Poor*, 21 Pick. 381. But this rule is here condemned, and also in *Lincoln v. Saratoga & Schenectady Railroad Co.*, 23 Wend. 435.

⁶ *Grace v. Morgan*, 2 Bing. N. C. 534; *Jenkins v. Biddulph*, 4 Bing. 160; *Sinclear v. Eldred*, 4 Taunt. 7. The only English case where this claim is countenanced, is *Sandback v. Thomas*, 1 Stark. 308. See *Webber v. Nicholas*, 1 Ryan & M. 419.

the plaintiff off the train under circumstances of some justification, no unnecessary force being used. A verdict of \$10,000 for personal injuries was sustained. *Montgomery & West Point Railroad Co. v. Boring*, 51 Ga. 582. So was a verdict for \$5,000 for injuries resulting in great physical and mental suffering, and permanent lessening of the strength of a broken leg. *Maysville & Lexington Railroad Co. v. Herrick*, 13 Bush, 122. So was a verdict for \$1,500 for an

accident producing a more aggravated condition of hernia. *Houston & Texas Central Railroad Co. v. Shafer*, 54 Tex. 641. See further, *infra*, § 203.

On the other hand, a new trial may be granted where the damages are so small as to show that the jury must have omitted to consider some elements of damage. In this case the verdict was for £7,000. *Phillips v. London & Southwestern Railway Co.*, Law Rep. 5 Q. B. Div. 78.

for I look on it not so much as a means of compensating the injured person, as of damaging the opposite party. In my personal judgment it is an unmanly thing to make such a claim. Such injuries are part of the ills of life, of which every man ought to take his share."⁷

7. The principle of this remark seems to be conceived in a more philosophic and Christian temper than would be altogether consistent with bringing any action at all. But it is sometimes refreshing to find minds soaring above the dead level of pecuniary equivalents, to which the profession are for the most part doomed, in connection with estimating the damages to be awarded for personal injuries. But it has always been held in this country that the bodily pain and suffering caused by an injury for which one party is legally entitled to claim compensation of the other, were legitimate elements to be proved and considered by the jury in estimating the pecuniary compensation which they shall award, notwithstanding the difficulty of reducing pain and pence to a common measure.⁸ (d)

8. It has been held the plaintiff might give evidence of the nature of his business and the value of his services in conducting it, as a ground of estimating damages by an injury through the negligence of the company, but not the opinion of witnesses as to the amount of his loss.⁹

⁷ *Theobald v. Railway Passengers' Assurance Co.*, 10 Exch. 45; s. c. 26 Eng. L. & Eq. 438. But see *Curtis v. Rochester & Syracuse Railroad Co.*, 20 Barb. 282, where the American rule is fully stated, as cited in the text, pl. 2. Damages arising from this source need not be specially stated in the declaration, unless of an unusual and unexpected character. *Ib.*; *supra*, § 176, note 15; § 179, notes 2, 5.

⁸ *Ransom v. New York & Erie Railway Co.*, 15 N. Y. 415; *Pennsylvania Railroad Co. v. Allen*, 53 Penn. St. 276. But see *Same v. Books*, 57 Penn. St. 339; *Winters v. Hannibal & St. Joseph Railroad Co.*, 39 Mo. 468; *infra*, § 203.

⁹ *Lincoln v. Saratoga & Schenectady Railroad Co.*, 23 Wend. 425.

(d) *Western & Atlantic Railroad Co. v. Drysdale*, 51 Ga. 644; *Pittsburg & Connellsville Railroad Co. v. Andrews*, 39 Md. 329; *St. Louis, Iron Mountain, & Southern Railroad Co. v. Cantrell*, 37 Ark. 519; *Mackoy v. Missouri Pacific Railway Co.*, 18 Fed. Rep. 236. And to the same effect, the more recent English cases. *Phillips v. Southwestern Railway Co.*, Law Rep. 4 Q. B. 406; *Phillips v. London & Southwestern Railway Co.*, Law Rep. 5 C. P. 280. As to damages for mental suffering in cases of assault, &c., committed in expelling the passenger from a train, see *infra*, § 203.

9. In actions against carriers of passengers for injuries, there seem, as we have said, to be no well-defined rules for estimating damages. It is a matter to be submitted to the sound discretion and judgment of the jury, who are to consider the actual loss to * the plaintiff, present and prospective, which is the very lowest amount they will feel justified in giving in any case. Beyond this, any rule for damages must be regarded as more or less *terra incognita*. There is no doubt juries often give damages altogether beyond any actual damage which it is supposed the party has sustained in a pecuniary point of view. And it is not uncommon, in charging juries upon this subject, to bring their attention, in considering the question of damages, to the degree and character of the misconduct of the defendants or their agents, and even to the public example of the trial and verdict. This has been sometimes seriously criticised by elementary writers, and sometimes, as we have seen, by judges, but we find no cases where new trials have been granted on account of such suggestions having been made in the charge to the jury. And when it is considered that verdicts in civil actions are the only effectual corrective of a most flagrant disregard of human life which often occurs in the transportation of passengers, we are not prepared to say that the jury are bound altogether to shut their eyes to the public example of their verdicts.¹⁰

10. In an action¹¹ by the father for loss of service from an injury to his infant son fourteen years of age, it was held that no damages could be given for the shock to the father's feelings, that being a proper consideration only in an action in the name of the son for the direct injury.¹¹

¹⁰ *Farish v. Reigle*, 11 Grat. 697; *Taylor v. Grand Trunk Railway Co.*, 48 N. H. 304; *Atlantic & Great Western Railway Co. v. Dunn*, 19 Ohio St. 162; s. c. 2 Redf. Am. Railw. Cas. 520. See also *Pittsburgh, Fort Wayne, & Chicago Railroad Co. v. Slusser*, 19 Ohio St. 157; *Robertson, J.*, in *Kentucky Central Railroad Co. v. Dilla*, 4 Bush, 593; *Goddard v. Grand Trunk Railway Co.*, 10 Am. Law Reg. n. s. 17; s. c. 2 Redf. Am. Railw. Cas. 502; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

¹¹ *Black v. Carrollton Railroad Co.*, 10 La. An. 33. And in *Coakley v. North Pennsylvania Railroad Co.*, 6 Am. Law Reg. 355, tried in the city of Philadelphia, for the death of a child fourteen years of age, by a collision of trains on defendant's road, the court adopted a similar view in regard to the rule of damages. They said it was not a case for exemplary damages; that the jury were to take into consideration the pecuniary services of the child

* 11. In an action in favor of a woman for damages sustained by the negligence of a railway company at a road-crossing, the death of plaintiff's husband by the same accident, or the fact that she has dependent children, is not admissible in evidence to increase the damages.¹²

12. Where in such case the plaintiff lost one arm and the use of the other, and was otherwise severely bruised and injured, so as greatly to impair health and memory, and be in constant pain, and she had at three successive trials recovered \$10,000, \$18,000, and \$22,250, respectively, the first two of which verdicts were set aside for errors in law, the court refused to set aside the third verdict on the ground that the damages were excessive.¹³

13. There is a recent case¹³ in the Court of Exchequer, where the question of the remoteness of damage recoverable in open actions is very carefully considered and judiciously treated. POLLOCK, C. B., said, "We apprehend, where the facts are known, it is the province of the court to say for what matters damages are to be given; but the amount of damage is a question for the jury quite as much as the credit due to the witnesses."

14. The learned judge here passes a most unqualified encomium upon *Hadley v. Baxendale*,¹⁴ as having been most carefully considered and wisely determined, and as having settled all ques-

until of age, and the expense incurred by the plaintiff after the accident, and the value of the society of the child, which might be regarded as the strongest claim; but that they were not to consider the anguish of the parents, nor inquire what a man would take for a child, for this would be speculative damages, and the value of human life is beyond price. The rule thus laid down is perhaps about as accurate as could be given. But it is evident that it will not bear strict analysis. For how can one estimate the value of the society of a child to a parent, and not consider the mental anguish consequent upon the death? It is the same thing under different forms of speech. All that can properly be said is, that the question of damages, within reasonable limits, rests entirely in the discretion of the jury. They are to be watchful that their verdict shall not be so inadequate to the injury as to appear like a denial of justice, nor so extravagant as to indicate that they have assumed the office of avengers of the plaintiff's wrongs, without due consideration of excuse for the defendant's conduct, which to some extent exists in all cases.

¹² *Shaw v. Boston & Worcester Railroad Co.*, 8 Gray, 45.

¹³ *Wilson v. Newport Dock Co.*, 4 H. & C. 232; s. c. Law Rep. 1 Exch. 177; 12 Jur. n. s. 233.

¹⁴ 9 Exch. 341.

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tions coming within the range of its compass. The words of his lordship in regard to the proper province of a jury in determining a question of damages, and the proper latitude to be allowed them, are worthy of repetition here, if we had space, and of grave consideration and remembrance wherever they have any just application.

15. In actions against common carriers, only such damages as necessarily and naturally result from the wrongful act can be recovered, unless special damages are alleged and proved.¹⁵ Consequently, where an unmarried woman received serious injury by the upsetting of a * passenger carriage, through the want of due care on the part of the carrier, it was held that no additional damages could be awarded on account of lessened prospect of marriage thereby, such damages not being specially claimed in the declaration or sustained by the evidence; upon either of which grounds the recovery was equally precluded.¹⁵

16. It is generally permitted for the plaintiff who claims to recover for loss of time, or loss of business, to prove the nature and extent of his business, and the probable profits arising therefrom, in order to enable the jury to form a correct estimate of his loss.¹⁶

17. Where the mother is to be compensated for the injury or loss consequent upon the death of her infant child, the shock or suffering of feeling is not to be taken into the account, but only the pecuniary loss, and that is not to be extended beyond the minority of the child.¹⁷ But the limitation of damages to the minority of the child seems very questionable. The exclusion from consideration in estimating damages of the suffering in feelings of the mother, has been usual under the English statute, and most of the American statutes are copied from that.

¹⁵ *Hunter v. Stewart*, 47 Me. 419. Where a passenger had been intrusted with a package of money, which he had with him at the time he was killed on defendant's road by the negligence of his servants, and the money was lost, but the defendant had no knowledge of the money, it was held that the owner could not recover for it. *Greenfield Bank v. Marietta & Cincinnati Railroad Co.*, 20 Ohio St. 259.

¹⁶ *Hanover Railroad Co. v. Coyle*, 55 Penn. St. 396. See also *Hyatt v. Adams*, 16 Mich. 180; *McIntyre v. New York Central Railroad Co.*, 37 N. Y. 287.

¹⁷ *State v. Baltimore & Ohio Railroad Co.*, 24 Md. 84; *supra*, § 195.

SECTION IX.

Carriers of Passengers and Goods cannot drive within the Precincts of a Railway Station.

§ 200. We have already shown that it is competent for railways to make by-laws regulating the conduct of passengers, and the use of stations, and other matters concerning the traffic.¹ It seems to be considered by the English courts, that even in a case where passengers, by the existing statutes and by-laws of the company applicable to the subject, have the right to insist upon coming upon the grounds adjoining the stations of the company, and even where the company generally allow omnibus drivers and other passenger carriers to come within the precincts of their stations without objection, a particular carrier of passengers who * was excluded from this privilege, had no ground of action against the company on that account.² But in a later case,³ where one was so excluded from driving his omnibus upon the grounds of the company in the same manner as other carriers of a similar character were allowed to do, no special circumstances being shown to justify the particular exclusion, it was held that the court, under the English Railway Traffic Act, might enjoin the company to admit the person excluded, with his vehicle, in the same manner and to the same extent to which they admitted others of a similar description. But the companies are not in England prohibited from giving a preference to certain cab-owners, either for compensation or other consideration, permit-

¹ *Supra*, §§ 26, 27, 28.

² *Barker v. Midland Railway Co.*, 18 C. B. 46; s. c. 36 Eng. L. & Eq. 253. This case is put on the ground of want of privity in contract, and also, that the grounds adjoining railway stations are not dedicated to public use in any such sense as to become a public highway for carriages.

The court intimate that under statute 17 & 18 Vict. c. 31, § 2 (Railway and Canal Traffic Act of 1854), which provides that railway companies shall afford reasonable facilities for receiving and forwarding traffic, without any preference or advantage to particular persons, even if the company is liable under the act, the party must pursue the specific remedy given by the statute.

³ *Marriott v. London & Southwestern Railway Co.*, 1 C. B. N. s. 499.

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ting them to come within their grounds, and excluding others.⁴ The complaint must come from those who use the railway, and be a *bona fide* complaint on behalf of the public interest.⁵

*SECTION X.

Duty resulting from the Sale of Through Coupon Tickets.

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| <ol style="list-style-type: none"> 1. Duty not the same as where goods and baggage are ticketed through. 2. Such sale to be regarded as a distinct sale of separate tickets for different roads. 2. (a). Effect of rule on limited tickets. 3. First company to be regarded as agent for the others. 4. Rule different if the business of the entire line is consolidated. 5. But in general such an arrangement is not regarded as a case of partnership. 6. Contracts so made, binding, though | <ol style="list-style-type: none"> companies are in different states or countries. 7. First company held liable for baggage not checked. 8. So for an injury occurring on another line, over which it has sold tickets. 9. A stage proprietor hiring a ferry, to carry the coaches over, is responsible for the safety of passengers on the ferry. 10. When line extends to different states, law of state where ticket was procured governs. |
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§ 201. 1. As the general duty of common carriers of passengers is different from that of common carriers of goods, so the implied contract resulting from the sale of through tickets for passengers is different. In the case of carriers of goods, and the baggage of passengers, we have seen that taking pay and giving tickets or checks through binds the first company ordinarily for the entire route.¹

2. But in regard to carrying passengers the rule is different, we apprehend. These through tickets, in the form of coupons, which are purchased of the first company, and which entitle the person holding them to pass over successive roads, with ordinary passenger baggage, sometimes for thousands of miles, in this country import commonly no contract with the first company to carry such person beyond the line of their own road. They are to be

⁴ *Beadell v. Eastern Counties Railway Co.*, 2 C. B. N. S. 509.

⁵ *Painter v. London, Brighton, & South Coast Railway Co.*, 2 C. B. N. S. 702.

¹ *Supra*, §§ 171, 172; *McCormick v. Hudson River Railroad Co.*, 4 E. D. Smith, 181.

regarded as distinct tickets for each road, sold by the first company as agents for the others, so far as the passenger is concerned; and unless the first company check the baggage beyond their own line, it is questionable, perhaps, how far they are liable for losses happening beyond their own limits.² (a) And where a person procured a * ticket in coupon form, over two distinct railways, and delayed two months at the end of the first railway before resuming his journey, it was held, that, being printed on separate pieces of paper and containing no restrictions, they were to be regarded as separate vouchers or contracts for distinct pas-

* *Sprague v. Smith*, 29 Vt. 421; *Hood v. New York & New Haven Railroad Co.*, 22 Conn. 1; s. c. 22 Conn. 502. When the latter case last came before the court it was held that the defendant was not estopped from denying that under its charter it had power to enter into a contract to carry passengers beyond its own road. But in this respect the case stands alone, probably, at present. See *Ellsworth v. Tartt*, 26 Ala. 733; *supra*, §§171, 172; *Straiton v. New York & New Haven Railroad Co.*, 2 E. D. Smith, 184. In this last case it was held that each company is liable only for the losses on its own line. *Knight v. Portland, Saco, & Portsmouth Railroad Co.*, 56 Me. 234; s. c. 8 Am. Law Reg. N. s. 654; where the question is very justly and fully presented by APPLETON, C. J., and the proposition maintained that each successive road is responsible for all injuries to through passengers, while on its own line, and in passing therefrom to the next company's line, until safely delivered on such line. s. c. 2 Redf. Am. Railw. Cas. 458.

(a) To that effect are *Furstenheim v. Memphis & Ohio Railroad Co.*, 9 Heisk. 238; *Nashville & Chattanooga Railroad Co. v. Sprayberry*, 9 Heisk. 852; *Pennsylvania Railroad Co. v. Connell*, 18 Am. & Eng. Railw. Cas. 339. And also *Hartan v. Eastern Railroad Co.*, 114 Mass. 44, which holds that though the first company may bind itself for the entire route, the mere sale of the ticket will not have that effect. And see *Central Railroad Co. v. Combs*, 70 Ga. 533. But in *Hudson v. Kansas Pacific Railway Co.*, 8 McCrary, 249, it was held that where a company sells a ticket for passage over its own and a connecting line, without limit upon the right of transfer, it must give a good local ticket or the price of one,

where the connecting road refuses to receive it, or respond in damages on the contract. As to what constitutes the contract where the company issues a book of coupons with printed conditions inside, see *Burke v. Southeastern Railway Co.*, Law Rep. 5 C. P. 1. A ticket over several roads, limited to a continuous passage, is good for a continuous passage over each road, and not merely for a continuous ride over all the roads. *Auerbach v. New York Central & Hudson River Railroad Co.*, 89 N. Y. 281; *Little Rock & Fort Smith Railroad Co. v. Dean*, 43 Ark. 529. This would seem to follow from the doctrine that there is a separate contract with each company. But if the ticket as a whole is limited in point of time, *quære*.

sages, and that the delay did not affect the rights of the holder.³ We apprehend that this is the general understanding in regard to the rights of the holders of such tickets. The only question which could fairly occur in case of any considerable delay between the different lines would be that it might justify requiring some explanation.

3. And the contract which commonly exists between the companies in regard to the division of the price of the through tickets, constitutes no such partnership as will render each company liable for injuries or losses occurring upon the whole route. The first company is, in such case, viewed as the agent of the other companies, and the transaction requires no different construction from one where the tickets of one company are sold at the stations of other companies, which is not very uncommon, and would never be regarded in any other light than that of agency merely.² But the passenger taking separate tickets for different portions of the line will not preclude him from showing, by oral proof, that the contract with the first company extended to the entire route. And this may also be established by circumstances attending the transaction.⁴

4. We are aware that in regard to consolidated lines of travel consisting of different companies or natural persons originally, where the entire fare is divided ratably, and all losses are deducted, it has been held that they constitute such a partnership as to render them all liable to third persons.⁵

5. But in one case, where the subject seems to have been a good deal examined, the rule is thus laid down: ⁶ "If the several

² *Brooke v. Grand Trunk Railway Co.*, 15 Mich. 332.

³ *Van Buskirk v. Roberts*, 31 N. Y. 661.

⁴ *Champion v. Bostwick*, 11 Wend. 572; s. c. 18 Wend. 175. See also *Carter v. Peck*, 4 Sneed, 203.

⁵ *Ellsworth v. Tartt*, 26 Ala. 733. And a similar rule is adopted in *Briggs v. Vanderbilt*, 19 Barb. 222, in regard to passenger transportation between New York and San Francisco, the line consisting of three independent companies, who had no common interest in the business throughout the route, although they advertised together as one line. And in this case, where the defendant gave the plaintiff a ticket for a passage by a particular ship, which had already been wrecked, without the knowledge of either party, it was held that the defendant was liable for the money received for the ticket, in an action for money had and received, as for the failure of the consideration for which the payment was made. See also *Northern Central Co. v. Scholl*, 16 Md. 331.

* proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not of itself constitute them partners, as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line."

6. Contracts made in this mode are binding upon all the companies, and it will make no difference that they are in different states or kingdoms.⁷ (b) And if one carrier so issue his tickets, or in other respects so conduct, as to have purchasers understand that he undertakes personally for the entire route, he will be held responsible to that extent.⁸

7. And where an excursion ticket was issued in Boston by a railway company terminating there, marked "from Boston to Montreal," with coupons attached for the connecting roads, marked in the same manner, a passenger who purchased the same, and delivered his baggage to the agent of the first company and demanded a check, was held, by the Supreme Judicial Court of Massachusetts, entitled to recover for the loss or non-delivery of such baggage at the termination of the route, the agent having refused to give the check, but having assured the passenger that such baggage would be perfectly safe, as he, the baggage-master, was going through the entire route.⁹

8. In an English case,¹⁰ where the first company sold a * ticket through an entire line composed of different companies worked

⁷ *Cary v. Cleveland & Toledo Railroad Co.*, 29 Barb. 35.

⁸ *Quimby v. Vanderbilt*, 17 N. Y. 306. His being an owner in the different portions of the route, and advertising it as his route, are circumstances justly tending to show a personal undertaking for the entire route.

⁹ *Najac v. Boston & Lowell Railroad Co.*, 7 Allen, 329.

¹⁰ *Great Western Railway Co. v. Blake*, 7 H. & N. 987; s. c. 8 Jur. n. s. 1013. In this case the plaintiff purchased a ticket in London, and paid one fare to Milford, in Pembrokeshire, and took one ticket for the entire route, as is the English custom. The line of the Great Western Company, of whom the plaintiff purchased his ticket, extends a short distance beyond Gloucester, and from thence to Milford the line belongs to the South Wales Company. By arrangement between the two companies the line is worked together, and the fares divided between them. The plaintiff was conveyed by the same carriage until he entered upon the line of the second company, when it came into collision with an engine left on the track by the servants of the latter com-

(b) *Sleeper v. Pennsylvania Railroad Co.*, 100 Penn. St. 259.

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in connection, and the same carriage going through, it was held they thereby assumed the responsibility of assuring the track to be kept in working condition throughout the entire route; and where the passenger was injured upon the track of another company, by the train coming in collision with a stationary engine left on the track by the servants of that company, without any fault of the driver of the train, it was held the first company were responsible. And in a later case¹¹ in the Exchequer Chamber, it was considered that the company issuing the ticket was responsible for any negligence which ensued throughout the journey, without regard to there being any business connection between the different companies.

9. Where a line of passenger transportation by stage coaches was intersected by a ferry not belonging to the passenger carriers, but hired to carry their coaches over, it was held the stage company were responsible for the negligence or misconduct of the ferry company and its servants, as being, for the time, their agents and servants.¹²

10. Where the same road extends through parts of different states and the passenger procures his ticket in one state for the entire route, and is injured in another state, the law of the place where the ticket was procured will govern.¹³

pany. There was no negligence on the part of the driver of the train. It was held that the first company was responsible to the plaintiff, since, under the circumstances, there was an implied obligation on its part to maintain the whole line in a fit condition for safe passage.

¹¹ *Thomas v. Rhymney Railway Co.*, 19 W. R. 477; s. c. Law Rep. 5 Q. B. 226; in Exchequer Chamber, Law Rep. 6 Q. B. 266. See also *Buxton v. Northeastern Railway Co.*, 16 W. R. 1124; Law Rep. 8 Q. B. 549.

¹² *McLean v. Burbank*, 11 Minn. 277.

¹³ *Dyke v. Erie Railway Co.*, 45 N. Y. 113.

SECTION XI.

Declarations of the Party, Competency as Evidence.

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| 1. Declarations of party in connection with other facts competent to show state of health.
2. But not to show the manner in which the injury occurred. | 3. Exposition of the application of the rule admitting declarations as part of the <i>res gestæ</i> . |
|---|---|

§ 202. 1. In trials for injuries to passengers, it has been allowed to show the plaintiff's complaints of the state of his health, and that he has not labored at his trade, being poor, and having a considerable family.¹ And statements, made by a patient to his physician, *for the purpose of receiving medical advice, in regard to the character and seat of his sensations, have been held competent evidence in his favor, in an action to recover damages for the personal injury which was the alleged cause of the malady or illness, even where such statements were made pending the action.² (a)

2. But in practice at *Nisi Prius*, it has generally been considered inadmissible to show the statements of the party injured,

¹ *Caldwell v. Murphy*, 1 Duer, 233 ; s. c. 12 N. Y. 416; 1 Greenl. Ev. § 102; *Aveson v. Kinnaird*, 6 East, 188; *Bacon v. Charlton*, 7 Cush. 581. In an action for damage sustained through defects in a highway, it is not competent for the plaintiff to give evidence of his declarations to his physician in regard to the cause of the injury, for which the physician was consulted. *Chapin v. Marlboro*, 20 Law Rep. 653. Nor in an action for damages by reason of collision between two carriages on the highway, can the plaintiff give evidence of the declarations of defendant's servant, that the plaintiff was not in fault, made at the time of the accident, and while the defendant was being extricated from the carriage. *Lane v. Bryant*, 20 Law Rep. 653.

² *Barber v. Merriam*, 11 Allen, 322.

(a) But otherwise as to exclamations of pain at a medical examination made after beginning of controversy, for the purpose not of treatment, but of making evidence. *Grand Rapids & Indiana Railroad Co. v. Huntley*, 38 Mich. 537. And otherwise, as to his declarations as to the past history of the case and the cause or duration of the injury. *Atchison, Topeka, & Santa Fe Railroad Co. v. Frazier*, 27 Kan. 463. As to the admissibility as part of the *res gestæ* of evidence of expressions of pain made after the injury, see *Houston & Texas Central Railroad Co. v. Shafer*, 54 Tex. 641.

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in regard to the manner in which the injury occurred, as, for instance, the manner of driving, or the rate of speed, the declaration of the party being competent only as to invisible and insensible effects of the injury, such as bodily and mental feelings, which are of necessity shown by the usual and only modes of expression applicable to the subject.¹ (b)

8. But the declarations of the engineer having charge of the train, and made at the time an injury occurs, have been received as evidence in an action for negligence against the company, as part of the *res gestæ*.² There can be no doubt of the soundness of this general proposition. But we think courts and text writers are very much in danger of extending the rule to declarations made at the *time* of the transaction, although forming no part of it. The declaration, to constitute a part of the transaction, must not only be made at the time the event is transpiring, but it must be made for the purpose of qualifying or giving character to some act then doing, and unless it is of this latter character it is no more admissible for being made at the time of the transaction than if made at any other time. And such, it seems to us, was the character of the declarations of the engineer that the train arrived at the crossing behind time, which were admitted in this case.⁴ (c)

² Hanover Railroad Co. v. Coyle, 55 Penn. St. 396.

⁴ 1 Greenl. Ev. § 108 and note, § 108 a.

(b) Cleveland, Columbus, & Cincinnati Railroad Co. v. Mara, 26 Ohio St. 185.

(c) Admissions of an agent or employé of the company made after the infliction of the injury, are inadmissible as part of the *res gestæ*. Hannibal & St. Joseph Railroad Co. v. Martin, 11 Brad. 386; Dietrich v. Baltimore & Halls Springs Railway Co., 58 Md. 347; McDermott v. Hannibal & St. Joseph Railroad Co., 73 Mo. 516; Furst v. Second Avenue Railroad Co., 72 N. Y. 542. To this point the cases are very numerous, and as they relate rather to a general rule of evidence than to the law of railways, reference is made to the reports *passim*. Evi-

dence of prior declarations is also generally inadmissible. Mobile & Montgomery Railroad Co. v. Ashcroft, 48 Ala. 15; Baltimore & Ohio Railroad Co. v. Sulphur Spring School District, 96 Penn. St. 65. But evidence is admissible to prove a conversation between the plaintiff and the offending employé, following immediately upon the principal occurrence and serving to illustrate its character. Bass v. Chicago & Northwestern Railway Co., 42 Wis. 654. See Terre Haute & Indianapolis Railroad Co. v. Jackson, 81 Ind. 19, where it is held, in an action by a passenger for being drenched with water, that evidence of the declaration of a brakeman of a

*SECTION XII.

Wrongful Expulsion of Passengers from Cars.

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| <p>1, 2, 6, 8. Liability of company for wrongful expulsion. Compensatory damages. Punitive damages.</p> <p>n. (b). Grounds on which company may expel passenger.</p> <p>8. Carrier a trespasser if he refuse to deliver baggage in such cases.</p> | <p>4. Company must keep strictly to terms of by-law regarding the production of tickets.</p> <p>5. Conductors bound to exclude disorderly or offensive persons.</p> <p>7. Passenger holding a season ticket to be shown when demanded, bound to pay fare if ticket not produced.</p> |
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§ 203. 1. It has been held that a passenger who was wrongfully expelled from the company's cars, after having surrendered his ticket, the conductor not crediting his statement, was not entitled to recover vindictive or punitive damages against the company, (a) unless they expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed.¹ (b)

¹ Hagan v. Providence & Worcester Railroad Co., 3 R. I. 88. This was an action on the case, and the rule of damages approved was, "that all damages for actual injury, loss of time, pain of body, money paid for employment of physician, or injury to the feelings of defendant," be allowed. This is as far as most cases go, in this form of action, unless in slander and libel; and it has been seriously questioned, how far damages in any case should be given for exemplary or punitive purposes. But in practice, that has more commonly been allowed, when the party acts in bad faith and from feelings of vindictive-

purpose to do it was admissible. Declarations of husband as to the manner of an injury to his wife, made upon inquiry to a third person, under circumstances not calling on her to respond, are inadmissible. Keller v. Sioux City & St. Paul Railroad Co., 27 Minn. 178.

(a) For the use of unnecessary force or of profane or indecent language in expelling a passenger from the train, exemplary damages may be given. Quigley v. Central Pacific Railroad Co., 11 Nev. 350; Hicks v. Hannibal & St. Joseph Railroad Co., 68 Mo. 329; Indianapolis, Bloomington,

& Western Railroad Co. v. Milligan, 50 Ind. 392; St. Louis & Southeastern Railway Co. v. Myrtle, 51 Ind. 566. See Bryan v. Chicago, Rock Island, & Pacific Railway Co., 16 Am. & Eng. Railw. Cas. 835. But compensatory damages only, where the passenger is merely expelled for refusing to pay fare, although the removal is unlawful. Townsend v. New York Central & Hudson River Railroad Co., 56 N. Y. 295; Parker v. Long Island Railroad Co., 13 Hun, 819.

(b) There are several grounds for expulsion of a passenger, in addition to those indicated in the text of this

* 2. But no doubt if one were put out of the cars wrongfully, and thereby suffered serious detriment in his business, he might
 ness. And in the case of railway companies, incapable of such motives, it is rather intimated, in the case cited above, that they would never be liable for such damages, unless upon some formal ratification of the act of their agent. But, on principle, it would seem that if the agent was so situated as to represent the company in the particular transaction, and for the time, they should be liable to the same rule of damages as the agent, although the form of action may be different. If the act is that of the company, it should be held responsible for all its consequences, and there seems quite as much necessity for holding the company liable to exemplary damages as their agents. It is difficult to perceive why a passenger, who suffers indignity and insult from an inexperienced or incompetent conductor of a train, should be compelled to show the actual ratification of the act of the conductor, in order to subject the company to exemplary damages, if the transaction was really of a character to demand such damages, and the company are liable at all. It would rather seem that the reasoning of the court, carried to its full extent, would show that the conductor, in that portion of his conduct which was tortious, did not represent the company at all. On the same principle it was at one time held, that a corporation is not liable to indictment for the misfeasance of its agents. *Infra*, § 225.

In *Higgins v. Watervliet Turnpike & Railroad Co.*, 46 N. Y. 23, it was held that a railway company is responsible for the act of its conductor, where he through mistake of facts or error in judgment wrongfully expels a passenger from its cars; and also where the conductor in rightfully expelling a passenger uses excessive force, though not wantonly or maliciously. This last qualification might well have been omitted. It would be wonderful if the company was not held responsible when the conductor acted from malice and wantonness, while still within the sphere of his employment. A conductor may use the requisite force to prevent one from unlawfully coming on the train. But after the person has come on the conductor must use reasonable discretion as to the time and mode of putting him off, and not cause needless injury. *Kline v. Central Pacific Railroad Co.*, 37 Cal. 400, 408; *supra*, § 199, pl. 9, note 10. From all which it abundantly appears that the law is now settled, that where the act of the conductor binds the company it will be responsible for damages to the full extent of the injury, the same as a natural person.

section. Refusal to pay fare is a 236, and cases *passim*. But otherwise ground for expulsion. *Stone v. Chicago & Northwestern Railway Co.*, 47 Iowa, 82. And an offer to pay after the train is stopped and the passenger is being put off, will not avail. *Gould v. Chicago, Milwaukee, & St. Paul Railway Co.*, 18 Fed. Rep. 155; *O'Brien v. New York Central & Hudson River Railroad Co.*, 80 N. Y. 236, and cases *passim*. But otherwise of an offer made before eviction by a fellow-passenger. *South Carolina Railroad Co. v. Nix*, 68 Ga. 572; *Louisville & Nashville Railroad Co. v. Garrett*, 8 Lea Tenn. 438. So is abuse of conductor and refusal of fare for failure to provide a seat. *Pittsburg, Cincinnati, & St. Louis Railroad Co. v. Van Houten*, 48 Ind. 90. So is

be entitled to recover special damages, but not probably without declaring specially in regard to such damages.²

3. Where a ship-owner refused to carry a passenger, whom he had engaged to carry, and proceeded on the voyage without giving the passenger reasonable opportunity to remove his baggage, or, with the intent to carry it beyond his reach, it was held, that he thereby terminated the contract of carriage, and was liable in trespass.²

² *Holmes v. Doane*, 3 Gray, 328.

insistence on going the longer of two routes without payment of additional fare. *Bennett v. New York Central & Hudson River Railroad Co.*, 69 N. Y. 594. So is the refusal to rectify wrong committed in the innocent purchase of ticket with counterfeit money. *Memphis & Charleston Railroad Co. v. Chastine*, 54 Miss. 503. So is the refusal to pay extra fare demanded where fare is paid on the train; and this, though the ticket office was closed when the passenger arrived, the train being past due. *Swan v. Manchester & Lawrence Railroad Co.*, 132 Mass. 116. And see *Chicago, Burlington, & Quincy Railroad Co. v. Griffin*, 68 Ill. 499; *Toledo, Wabash, & Western Railway Co. v. Wright*, 68 Ind. 586. So, where a passenger has been expelled, and has purchased a ticket and re-entered the train, a refusal to pay fare for the distance already travelled will justify expulsion. *Stone v. Chicago & Northwestern Railway Co.*, 47 Iowa, 82. And see *Swan v. Manchester & Lawrence Railroad Co.*, 132 Mass. 116. So, where the passenger refuses to correct an error in making change, money actually paid being used up by the distance already travelled. *McCarthy v. Chicago, Rock Island, & Pacific Railroad Co.*, 41 Iowa, 432. And generally, a passenger may be expelled whenever he is

on the train without right. *Shelton v. Lake Shore & Michigan Southern Railway Co.*, 29 Ohio St. 214; *Lake Shore & Michigan Southern Railway Co. v. Pierce*, 47 Mich. 277. Or where he resists any lawful requirement so far as to provoke a breach of the peace. *Pease v. Delaware, Lackawanna, & Western Railroad Co.*, 26 Am. & Eng. Railw. Cas. 185. But a passenger has a right to pay from station to station, and cannot be expelled if he offers to do so. *Chicago, Burlington, & Quincy Railroad Co. v. Bryan*, 90 Ill. 126. Nor can the company expel a well-behaved passenger who has a ticket. *Churchill v. Chicago & Alton Railroad Co.*, 67 Ill. 390. And error on the part of the conductor will not excuse. *Quigley v. Central Pacific Railroad Co.*, 11 Nev. 350; *Graham v. Pacific Railroad Co.*, 66 Mo. 536. But a ticket wrongfully taken up by the conductor of a previous train will not avail the passenger. *Townsend v. New York Central & Hudson River Railroad Co.*, 56 N. Y. 295. Except as the ground of an action against the company. *Ib.*; s. c. 6 Thomp. & C. 495; *Shelton v. Lake Shore & Michigan Southern Railway Co.*, 29 Ohio St. 214; *Toledo, Wabash, & Western Railway Co. v. McDonough*, 53 Ind. 289. And the mistake of the former conductor in giving a trip check in place of a stop-

4. Where the company have a by-law or regulation by which passengers are bound to produce their tickets when required so to do, they must bring themselves strictly within the terms of the

over check will make no difference. *Yorton v. Milwaukee, Lake Shore, & Western Railway Co.*, 54 Wis. 234. But representations of the conductor to the passenger that he may continue his journey on a succeeding train on the same ticket will bind the company. *Tarbell v. Northern Central Railway Co.*, 24 Hun, 51. See *Petrie v. Pennsylvania Railroad Co.*, 42 N. J. Law, 449; *Denny v. New York Central & Hudson River Railroad Co.*, 5 Daly, 50.

A passenger rightfully on the train has a right to resist expulsion, and if injured may recover for the injury. *English v. Delaware & Hudson Canal Co.*, 66 N. Y. 454. For instance, if he has a ticket bought of a regular agent, said to be good and on its face appearing to be so. *Hubbard v. Grand Rapids Railroad Co.*, 18 Am. & Eng. Railw. Cas. 336. Where the ticket has been punched, see *Murdock v. Boston & Albany Railroad Co.*, 137 Mass. 293. But the *bona fide* purchaser of a ticket originally obtained by fraud acquires no title. Selling and stamping by an authorized agent gives none. *Frank v. Ingalls*, 42 Ohio St. 560. Where a conductor accidentally cancels a return ticket and does not fix it properly, so that the passenger on his return is put off, the company is liable. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Rice*, 64 Md. 63. So the passenger may resist an effort to expel him from a train in motion. *English v. Delaware & Hudson Canal Co.*, *supra*. But in general, the passenger should submit without resistance, and resort to his legal remedy for any wrong done. *Hall v. Memphis & Charleston Railroad Co.*, 15 Fed. Rep. 57.

Expulsion should in general be at a regular station. *Toledo, Peoria, & Warsaw Railroad Co. v. Patterson*, 63 Ill. 304. But see *Chicago, Burlington, & Quincy Railroad Co. v. Boger*, 1 Brad. 472. And see *Brown v. Chicago, Rock Island, & Pacific Railroad Co.*, 51 Iowa, 235; and *Wyman v. Northern Pacific Railroad Co.*, 22 Am. & Eng. Railw. Cas. 402. And such station will not be an improper place merely because there is no hotel. *Hall v. Memphis & Charleston Railroad Co.*, 15 Fed. Rep. 57. As to ejection of passenger in night injured in walking to station, see *International & Great Northern Railroad Co. v. Gilbert*, 22 Am. & Eng. Railw. Cas. 405.

The passenger must not be removed with unnecessary violence. *Gallena v. Hot Springs Railroad Co.*, 13 Fed. Rep. 116; *Brown v. Hannibal & St. Joseph Railroad Co.*, 66 Mo. 588.

As to expulsion from freight trains, see *Lake Shore & Michigan Southern Railway Co. v. Greenwood*, 79 Penn. St. 373; *Falkner v. Ohio & Mississippi Railway Co.*, 55 Ind. 369; *Illinois Central Railroad Co. v. Johnson*, 67 Ill. 312. As to expulsion from ladies' car, see *Bass v. Chicago & Northwestern Railway Co.*, 39 Wis. 636; s. c. 42 Wis. 654; *Peck v. New York Central & Hudson River Railroad Co.*, 6 Thomp. & C. 436. A regulation unknown to the passenger, restricting the holders of tickets such as he has to special trains, nothing of the sort appearing on the tickets, will not justify his expulsion from another train. *Maroney v. Old Colony & Newport Railroad Co.*, 106 Mass. 153.

by-law. (c) And where the by-law provided that no passenger should enter any carriage of the company, or ride therein without first paying fare and procuring a ticket, which he was to show when required, and to deliver up before leaving the carriage, and the master procured tickets for himself and his servants, who were allowed to enter the carriages upon the master telling the guard he had tickets for them, without the servants being required to produce them, each for himself, it was held the master might recover for the expulsion of the servants for not producing their tickets.³

5. The conductor of a street railway car may exclude or expel from the car any person, who, by reason of intoxication or otherwise, is in such a condition as to render it reasonably certain that his presence or continuance in the vehicle would create inconvenience or disturbance, or cause discomfort and annoyance to other passengers.⁴ It is the duty of such passenger carriers to take all reasonable and proper means to insure the safety, and provide for the comfort and convenience of their passengers, and for that purpose to repress and prohibit all disorderly conduct in * the cars, and to expel or exclude therefrom persons whose conduct or condition is such as to make acts of impropriety, rudeness, indecency, or disturbance either inevitable or probable; and the conductor is not bound to wait until some act of violence, profaneness, or other misconduct has been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender.⁵ (d)

³ *Jennings v. Great Northern Railway Co.*, Law Rep. 1 Q. B. 7; s. c. 13 Law T. N. s. 231. See also *Dearden v. Townsend*, Law Rep. 1 Q. B. 10; s. c. 13 Law T. N. s. 323.

⁴ *Vinton v. Middlesex Railroad Co.*, 11 Allen, 304.

⁵ *Bigelow, C. J.*, in *Vinton v. Middlesex Railroad Co.*, 11 Allen, 306.

(c) But the passenger is entitled to a reasonable time to find his ticket. *Hayes v. New York Central & Hudson River Railroad Co.*, 18 Am. & Eng. Railw. Cas. 363. So he is to pay, and for that purpose to go to another part of the train to borrow money. *Clark v. Wilmington & Weldon Railroad Co.*, Ib. 366.

(d) *Railway Co. v. Valleley*, 32 Ohio St. 345. And if the conductor exercise reasonable prudence in expelling a drunken passenger, the company will not be liable for his death where he is afterwards killed by a passing train. The expulsion is not the proximate cause. *Ib.* A railway company cannot, however, exclude unchaste women, un-

6. Where one gave half his ticket to another to enable him to ride upon it, and was expelled from the cars on the ground that he had not paid his fare, and left a pair of opera glasses behind, in the carriage, without asking to have them taken out, he was held not entitled to recover the value of the same, as special damages resulting from the assault.⁶

7. Where a season ticket was issued upon the condition that it should be shown to the conductor when demanded, and that no duplicate should be issued, and the same was accidentally lost, so that the holder could not produce it, he was held liable to pay fare.⁷

8. It has been held, that where a passenger is put on shore short of the port of destination, under circumstances of indignity and insult calculated to wound his sensibility, he is entitled to show the circumstances of his disembarkation and the language used by the captain, as a ground for enhancing damages.⁸

* *Glover v. London & Southwestern Railway Co.*, Law Rep. 8 Q. B. 25.

† *Ripley v. New Jersey Railroad Co.*, 80 N. J. 388.

‡ *Coppin v. Braithwaite*, 8 Jur. 875. But passenger carriers cannot be subjected to punitive damages except in clear cases of gross negligence or wilful misconduct. *Bannon v. Baltimore & Ohio Railroad Co.*, 24 Md. 108; *Baltimore & Ohio Railroad Co. v. State*, 24 Md. 271; *Baltimore & Ohio Railroad Co. v. Breinig*, 25 Md. 378; *supra*, § 199.

less their conduct is annoying, or their reputation such as to afford reasonable ground for believing that they will be offensive to other passengers. The rule obtaining in hotels and theatres does not apply to a passenger carrier. *Brown v. Memphis & Charleston Railroad Co.*, 5 Fed. Rep. 499. And see s. c. 4 Fed. Rep. 37; s. c. 7 Fed. Rep. 51. But a passenger who is obscene or otherwise offensive may be expelled. *Murphy v. Western & Atlantic Railroad Co.*, 21 Am. & Eng.

Railw. Cas. 258. See further, as to the exclusion or expulsion of disorderly or offensive people, *supra*, § 198, note (b).

A child "stealing a ride" on the platform, though a trespasser and so properly to be expelled, must not be expelled in such a manner as to endanger either life or limb. *Biddle v. Hestonville, Mantua, & Fairmount Passenger Railroad Co.*, 26 Am. & Eng. Railw. Cas. 208.

SECTION XIII.

Paying Money into Court, in actions against Passenger Carriers.

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| 1. Payment into court under general count in tort admits only damages to the amount paid. | 2. But payment in cases of special contract admits the contract and breach alleged. |
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§ 204. 1. Where a declaration in tort is general, and without specification of the particulars of the cause of action, the payment of money into court admits a cause of action, but not the cause of * action sued for, beyond the amount paid into court, and the plaintiff must give evidence before he is entitled to damages, beyond the amount paid into court.

2. But if the declaration be specific, so that nothing is due unless the defendant admits the specific claim in the declaration, the payment of money into court admits the cause of action sued for,¹ both the contract and the breach of it.

¹ *Perren v. Monmouthshire Railway & Canal Co.*, 17 Jur. 532; s. c. 20 Eng. L. & Eq. 258. The declaration here stated a contract to carry plaintiff from N. to E., and a negligent breach of duty in the performance of it, and damages. Plea, payment of £25 into court, and replication, damages, *ultra*. It was held that the negligence was admitted, and the plaintiff was entitled to recover all damages proved, even beyond the £25, without introducing proof to show defendant guilty of negligence on his part.

The general subject of the effect of paying money into court will be found examined to some extent in *Hyde v. Moffatt*, 16 Vt. 286; *Bacon v. Charlton*, 7 Cush. 581. See also, on this general subject, *Stapleton v. Nowell*, 6 M. & W. 9; *Fischer v. Aide*, 3 M. & W. 486; *Story v. Finnis*, 6 Exch. 123; s. c. 3 Eng. L. & Eq. 548.

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SECTION XIV.

Liability where Company uses the Track of Another.

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| <p>1, 2. Liability of company whose road is used, to drover on cattle train for torts committed by its own employés.</p> <p>3. Liability of company to passengers on cars of another company received and placed in charge of its own servants.</p> | <p>4. Liability to its passengers of company running over the road of another.</p> <p>5. Liability of company running over line of another for injury to cattle on track.</p> <p>6. Responsibility measured by general law.</p> |
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§ 204 a. 1. In one case, the plaintiff had employed the defendants to transport cattle from Vermont to Boston, by their trains. By the custom of defendants, the plaintiff was allowed to go as a passenger in a saloon car attached to the cattle train, without additional charge, to enable him to look after the cattle. The train, in its passage, went over the Northern New Hampshire Railway, that company furnishing the motive power, with their engineer and fireman, but the defendant's conductor continuing with this train through the route. While the train was passing over the Northern New Hampshire Railway, without any fault of those who had the management of it, but through the sole negligence * of the other servants and employés of the Northern New Hampshire Railway, the saloon car, which carried the plaintiff, was broken in by a collision with another train going in the same direction, and the plaintiff seriously injured.

2. It was held, that the undertaking of the defendants, in regard to carrying plaintiff, was of a limited and special character, and did not render them responsible for injuries which he might sustain by the misconduct of other parties ;¹ that the plaintiff being

¹ *Sprague v. Smith*, 29 Vt. 421. It was argued in this case, that, as the defendant's contract bound it absolutely to carry the freight, and the plaintiff went, as incidental to the main contract, the same kind of liability should be assumed in regard to him, if not to the same extent. But the plaintiff can in no sense be regarded otherwise than as a passenger. The same rule applies to agents and servants, and to negro slaves. *United States v. The Thomas Swan*, 19 Law Rep. 201. There is the same difference between the liability of carriers always, for the person of a passenger and for his baggage. In the case of *Sullivan v. Philadelphia & Reading Railroad Co.*, 6 Am. Law Reg.

aware, from the very nature of the transaction, that he would be exposed to perils of this character, must be supposed to undertake, upon his own part, to sustain that hazard, and could not justly be allowed to throw it upon an innocent party, who was known to him, at the time of entering into the contract, to have no control over the persons causing the plaintiff's injury.² And this case may be maintainable upon this latter ground and the peculiar circumstances of the undertaking, but probably not upon general principles applying to passenger carriers.³

3. In a case in Massachusetts, it was held, that a railway company which receives the cars of another company upon its * track, placing them under the control of its agents and servants, and drawing them by its locomotive power, assume towards the passengers the common liability of passenger carriers,⁴ and that it makes no difference, in regard to the liability of the company to passengers passing over their road, whether they purchase tickets of them, or of any other railway company or agent authorized to sell such tickets.⁴

342; s. c. 30 Penn. St. 234; s. c. 2 Redf. Am. Railw. Cas. 564, it is held, that a railway company cannot excuse itself as a carrier of passengers where injury occurs in consequence of cattle straying upon the track, through defect of fences, which, as to the owners of the cattle, the company is not bound to maintain, because such act is a trespass against the company. It is the duty of the company to exclude cattle from its track for the security of passengers. But this rule would not probably be extended to such acts of trespass as no reasonable foresight or caution could anticipate or guard against. *Supra*, § 127, note 6.

² *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; *Thorogood v. Bryan*, 8 C. B. 115, 129. But the carrier is himself responsible for the acts and neglects of all persons, natural or corporate, who are employed in carrying out his undertaking, for they are, *pro hac vice*, his servants. *Ryland v. Peters*, Phila. 264.

³ *Infra*, pl. 4, and note 5.

⁴ *Schopman v. Boston & Worcester Railroad Co.*, 9 Cush. 24. The rule stated in the text extends to freight as well as passengers. And it will not exonerate the company drawing the trains of other companies over its line that the other companies had agreed to assume the risk of the transportation. *Vermont & Massachusetts Railroad Co. v. Fitchburg Railroad Co.*, 14 Allen, 462. In this case the defendant claimed not to be responsible to the other company under the contract, because by its terms that company assumed all the risk of the transportation except what occurred from the negligence of the defendant, or defect in its track, and here the damages arose from a defect in the track not attributable to negligence. But the company was held liable.

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4. But the rule of law in regard to passenger carriers who run over other roads than their own seems now to be pretty well established, that the first company is responsible for the entire route, and must take the risk of the negligence of the employes of the other companies.⁵ (a)

5. And in one case, where cattle were injured by a train run by a company other than the owners of the line, running thereon by permission of the owners, and the animals came upon the track through defect of fences which it was the duty of the owners of the line to build, it was held that the company running the train were responsible for the injury, although the owners of the line might also have been responsible for the same.⁶

6. Where a company took leave to run upon the line of another company under the general railway law of the state, by means of a lease of the second company, which was organized under the general railway law, the former company acting under a special statute, it was held that the responsibility of the first company in running the second company's road must be determined by the provisions of the general railway law, and not by the special charter of the first company.⁷

⁵ *Illinois Central Railway Co. v. Barron*, 5 Wal. 90; s. c. 2 Redf. Am. Railw. Cas. 471; *supra*, § 201, pl. 8, and note. See *Ayles v. Southeastern Railway Co.*, Law Rep. 8 Exch. 146; *Birkett v. Whitehaven Junction Railway Co.*, 4 H. & N. 730.

⁶ *Illinois Central Railroad Co. v. Kanouse*, 39 Ill. 272.

⁷ *McMillan v. Michigan Southern & Northern Indiana Railroad Co.*, 16 Mich. 79.

(a) To that effect are *Keep v. Indianapolis & St. Louis Railroad Co.*, 3 McCrary, 208; s. c. Ib. 302. But in such case, the company furnishing the power is also liable where the injury is the direct result of the negligence or want of skill of its servants. Ib. *panies having connecting lines do not affect the duty of the companies to a holder of a ticket to use due care to carry him through. Little v. Dusenberry*, 46 N. J. Law, 614. As to the liability of lessees generally, see *supra*, § 144.

Leases and agreements between com-

*SECTION XV.

Law of the Place governs.

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| 1, 8. Liability of corporations governed by the <i>lex loci</i> .
2. This is in conformity with the general law.
4. Jury permitted to say what was reasonable under a special contract as to the time of shipping goods from a foreign country. | 5. But in the absence of special contract, the law of the country to which the ship belongs governs.
6. Rights of parties on collision in a British port, settled by the law of that country. |
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§ 204 *b*. 1. Corporations, as we have seen,¹ can only act in conformity with the law of the state or sovereignty by which they are created. It must follow, by parity of reason, that such corporations are responsible, as carriers, only to the extent and in conformity to the law of the state or jurisdiction where the contract is made or the duty undertaken.² And it will make no difference whether the action is in form *ex contractu* or *ex delicto*.

2. This is in conformity to the general rule of law upon the subject of contracts and torts. Thus, in an English case,³ in the Exchequer Chamber, where the subject is considerably discussed with reference to torts committed abroad, it was held, that an action will lie in the common-law courts of the realm, in respect of an assault or other tort committed by one English subject against another English subject beyond the realm, provided that the foreign law prevailing on the spot gave compensation or damages for the offence to the party injured.

8. So that, most unquestionably, where railway corporations are sued out of the jurisdiction by which they were created, and under whose laws alone they can act, the extent and degree of their responsibility must be determined by the law of the place of the existence and action of such corporation.

4. And on a contract made in a foreign country with carriers to transport goods to this country, and alleged breach of duty by

¹ *Supra*, § 17 *a*.

² *Hale v. New Jersey Steam Navigation Co.*, 15 Conn. 539.

³ *Lord Seymour v. Scott*, 9 Jur. n. s. 522; s. c. 1 H. & C. 219; 8 Jur. n. s. 568.

negligence in causing an injury to them in that country, no question * of the *lex loci* being raised, upon the express contract and evidence of the course of business there, and other facts in the case, it was left to the jury to form a judgment whether there had been such negligence as to cause a breach of duty, and what would be reasonable under the circumstances.⁴

5. So too, where the contract of affreightment does not provide otherwise, it has been held, that in respect of sea damage and its incidents, including liabilities on a bottomry bond, the law of the country to which the ship belongs must govern.⁵

6. And where a collision between American vessels occurred in a British port, the rights of the parties depend upon the British statutes or laws there in force; and if doubts exist as to their true construction, our courts will adopt that which is sanctioned by the courts of Great Britain.⁶

⁴ *Cohen v. Gaudet*, 3 Fost. & F. 455. And in this case, where there was an express contract to send goods into England, the jury were told the contract meant in a reasonable time, and that the default of carriers by sea employed by them to carry the goods would be no excuse for a delay to ship them in a reasonable time, or for damage done on the quay or on the passage, which might have been avoided by reasonable despatch.

⁵ *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115.

⁶ *Smith v. Condry*, 1 How. 28.

PART IX.

THE LAW OF TELEGRAPH COMPANIES.

PART IX.

THE LAW OF TELEGRAPH COMPANIES.

*CHAPTER XXVIII.

TELEGRAPH COMPANIES.

Their Rights, Duties, and Responsibilities.

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| <ol style="list-style-type: none">1. Ordinary corporate rights and duties of telegraph companies discussed elsewhere.2. Chief inquiry, as to third parties, is, who shall assume the risk in transmitting a message.3. Telegraphic communications must be proved by production of the original, or in default of that, of the copy, &c.4. Question, whether the message delivered to the operator, or that received, is the original.5. If the party sending the message is the actor, that received at the end of the line is the original.6. But a mere reply, or message sent on behalf of the person to whom sent, is the original when delivered to the operator.7. Where both parties agree to communicate by telegraph, each assumes the risk of his own message.
n. 5, 6. Making of contracts by telegraph.8. Resemblance of correspondence by mail to correspondence by telegraph.9. If one employ a special operator, he assumes the risk of transmission. It is his own act by his agent. | <ol style="list-style-type: none">10. Both parties may be entitled to maintain actions for default in transmitting messages.11. Notice that company will not be responsible for mistakes in un-repeated messages binding.
n. (a). But not to relieve the company from the consequences of its own negligence.12. American courts adopt the same view. Company always responsible for ordinary neglect.13. Companies can be regarded as insurers of the accuracy of none but repeated messages.14. Held responsible, however, in a case where specially cautioned.15, 17. But generally, not responsible for errors in un-repeated messages, except on proof of negligence or want of skill.16. Telegraph companies not responsible as common carriers, and may limit responsibility to their own lines and to repeated messages, if not guilty of negligence.18. Responsibility of receiving company for messages passing over different lines.19. Difficulties in establishing a proper rule of damages. |
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| 20. To render the business safe, it is necessary only to understand the messages correctly.
21. Ordinary rule of damages applicable * to contracts should be applied here.
22. That messages are not fully understood by the companies makes no essential difference in the application of the rule.
23. Party, on discovering mistake, must elect whether to adopt it or not.
24. Rule of damages adopted in some unreported cases.
25. Statute penalty. Party entitled to recover is the contracting party. | 26. Duty to serve all without discrimination or preference. Disclosing secrets of office.
27. Miscellaneous points as to poles in the highway, submarine cables, &c.
28. Numerous points in a particular case.
29. Powers of courts of equity in vindicating the exclusive rights of such companies.
30. Duty of companies to transmit messages promptly and fairly.
31. Numerous points decided in another case.
32. Congress has exclusive control of telegraphs, so far as they are an instrument of interstate commerce. |
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THE importance of telegraph companies to the business interests of the country seems to require that the profession should be able to find ready access to the decided cases bearing upon those interests, whether having reference to those of the companies or of the public. And the intimate connection between the railways and telegraphs, as well as the similarity of the changes wrought in business operations by each, seem to justify the expectation that the law applicable to both should be combined in the same treatise. These considerations have induced us to here insert the leading propositions hitherto declared in the courts, both in England and America, bearing exclusively upon the rights, interests, and duties of telegraph companies.

§ 204 c. 1. We have before considered most of the questions bearing upon the rights and duties of telegraph companies, as corporations, — requiring to take land compulsorily for their construction, and contracts for construction, since these questions do not differ materially from those which arise in the construction of railways.¹

* 2. The questions in regard to telegraph companies which have an exclusive bearing in that direction must naturally be expected to have chief reference to their duty in accurately transmitting messages; the mode of proof, and which party, as between third

¹ *Supra*, §§ 1-123 b. But at the time of the publication of the former editions of this work telegraph companies were only in the state of early infancy, and the courts had decided very little upon points having exclusive reference to those companies, either in regard to their internal or external interests.

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person, takes the risk of any want of accuracy in such communications. These points are somewhat considered in a case in Vermont, decided at a comparatively early day, before much had been settled by the courts in regard to them.²

3. It is here declared, that where a telegraphic communication is relied upon to establish a contract, it must be proved as other writings are, by the production of the original. If that is lost it may be proved by a copy, or, in default of that being obtainable, by oral testimony. But it has been held, that where the principal portion of the contract is settled by oral communication between the parties, and the telegraph is resorted to for the purpose of settling some incidental matters connected therewith, the contract will be susceptible of proof by oral evidence, and the telegram is to be received as proof of the particulars settled thereby.³

4. Questions may arise in regard to what is to be regarded as the original, in communications transmitted by telegraph,—whether the written message delivered to the operator at the office from which sent, or the copy of the despatch delivered by the office at which it was ultimately received.

5. This will depend upon which party takes the risk of transmission; in other words, whose agent the telegraph becomes in the transmission. Where the party sending the message is the responsible party, acting on his own behalf, or on behalf of a principal, * who desires to send the message to give information which he desires to have acted upon, or to obtain a reply with a view to initiate a contract, the message delivered at the end of the line is the original.

6. A mere reply, without new conditions, or a message which the party to whom it is sent desires to have sent, and consequently takes the risk of transmission, becomes the original when delivered to the operator, and cannot strictly be proved except by itself.

² *Durkee v. Vermont Central Railroad Co.*, 29 Vt. 127. See also *Matteson v. Roberts*, 25 Ill. 591, where it is held that a copy of a telegram is not evidence, that the original should be produced or its absence accounted for.

³ *Beach v. Raritan & Delaware Bay Railroad Co.*, 37 N. Y. 457. There is a somewhat remarkable decision in *Williams v. Birkett*, 37 Miss. 682, that the person to whom a telegram is directed is not competent to prove its contents, without accounting for its loss, and proof that the author sent it; but the admission of the alleged writer that he did send it and of its contents, is competent.

But where the papers on which the original messages are written and delivered are not preserved, after being entered in the books of the company, the first copy made becomes the best proof of the original. Our own view may be seen from the language used in delivering the opinion in the case last cited.⁴

7. In a recent case in New York⁵ it was held, in the court below, that where the * parties have agreed that the communica-

⁴ *Durkee v. Vermont Central Railroad Co.*, 29 Vt. 127.

⁵ *Trevor v. Wood*, 41 Barb. 255; s. c. reversed, 36 N. Y. 307. The rule in regard to contracts by correspondence through the mail is well settled. Where one makes an offer and requires a reply by mail, the contract is closed the moment the reply is mailed or deposited in the authorized place of deposit for letters in the post-office or elsewhere for the mail. *Vassar v. Camp*, 12 N. Y. 441; *Taylor v. Merchants' Insurance Co.*, 9 How. 390. But these and all similar cases go upon the ground that the person making the offer directs by implication that the reply to his proposition shall be made through the mail, so that when it is so made the contract shall be considered as closed. That is said almost in terms in *Taylor v. Merchants' Insurance Co.*, and clearly implied in the terms of the offer in *Vassar v. Camp*. And in the latter case it is said that the offerer may make it a condition that the contract shall not bind him until he receives notice of acceptance, or unless he receives such notice in a specified time. But where nothing is said it is the fair implication that one making an offer through the mail expects a reply in the same way; and unless he annexes some express condition to his offer, he must, as a reasonable man, expect to be bound by it if it is accepted in the mode indicated by the terms of the offer. Were this rule of construction not adopted it would be impossible ever to have a contract closed, as both parties at all times having the *locus penitentiae* might exercise it on the receipt of the reply or before. And so in all reason one who sends an offer by telegraph, asking a reply, is bound the moment the reply is delivered to the company to be sent. One who sends a proposition by telegraph and asks for a reply, must, in all reason, expect that a reply by telegraph will be understood.

There does not, however, yet seem to be any decided case which makes the party initiating a contract by telegraph responsible for the transmission of the answer to his proposition. The point is, incidentally, somewhat discussed by WILLES, J., in *Godwin v. Francis*, Law Rep. 5 C. P. 295. The learned judge here declares that the party signing the message, in reply to a proposition affecting the title of land, will be regarded as having executed a sufficient written contract within the statute of frauds, and that it will be sufficient if the same is transmitted in the usual mode by the operator on the telegraph. Correspondence by telegraph is here compared by way of illustration with that carried on through the post-office. There is, however, some intimation that the law may not be precisely the same in the former as in the latter case; but no distinction is pointed out. Since the Act of Parliament transferring the telegraph to the post-office, one could scarcely conjecture any reason why

tions between them shall be by telegraph, this in effect is a warranty by each party that his communications to the other shall be received; and that a communication by telegraph is only initiated when it is delivered to the operator; that it is completed when it comes to the party for whom it is designed.

8. It is here said, that the rules of law applied to contracts made by correspondence by mail are not applicable to communications by telegraph. But it seems to us that the same rules will in the main apply. For in both cases the party taking the risk of transmission will be the same, and the consequences of mistake or failure will ordinarily fall upon the same party in both modes of communication. But this case seems to hold that there is a distinction between the two modes of communication, in that the post-office, being a public institution, is not the agent of either party, but is alone responsible for the transmission of letters, while the telegraph is the agent of the party employing it. But we do not *comprehend the existence of any such distinction. Both are the agents of the party employing them, and such party is responsible for the safe transmission of messages by either. This is well illustrated by the transmission of money by mail.

there should be any difference. But the courts have not yet seen the way clear to go that length. The message cannot be extended by reference to a writing made on the Lord's Day, so as to constitute a writing under the statute. *Hazard v. Day*, 14 Allen, 487.

In *Henkel v. Pape*, Law Rep. 6 Exch. 7, the defendant wrote a message for transmission by telegraph to the plaintiffs, ordering "three" rifles. The message sent was for "the" rifles; and the plaintiff, supposing it had reference to a former communication with the defendant, sent him fifty rifles, the number before named by him that he might want. The defendant refused to take more than three, and the plaintiff brought suit for the fifty. The court held the defendant was not responsible for the mistake in transmitting his message, and that the plaintiff could recover for three only. But in *Playford v. United Kingdom Electric Telegraph Co.*, Law Rep. 4 Q. B. 706, it was held that the party employing the telegraph company, or sending the message on his own account, alone could maintain an action for any failure of the company to perform its duty in respect of the message. If both these decisions are maintainable there would often arise cases in which the company would wholly escape all practical responsibility for its defaults. There seems to be an inconsistency, if not a blunder, in holding the only party who can sue not responsible for the mistake. The party who suffers by the mistake should, at all events, be allowed to maintain an action to recover the damage sustained by him; and this is understood to be the rule in this country. *Supra*, § 191, p. 202, pl. 6, note 11 (vol. 2).

If the debtor assumes to send the amount of his debt by mail, without instructions from his creditor to do so, he takes the risk of safe delivery, and consequently makes the post-office his agent throughout the transit. But if the creditor directs the money sent by mail, it becomes his agent for the purpose, and the risk is his, and the debt paid the moment the money is placed in the post-office, whether it ever reaches the creditor or not.⁶

9. Where one employs a special agent, who is not the regular operator, to transmit a message across the wires, he takes the *responsibility of correct transmission, whether such would have been the case or not if he had employed the usual agencies of telegraphic communication.⁷ And where such message had reference to responsibility for the act of another, the sender will be bound to the extent of what his agent transmits, whether he so intended or not. And a message so sent will be the same as if

⁶ The case of *Trevor v. Wood*, 41 Barb. 255, 36 N. Y. 307, as before stated, was reversed by the Court of Appeals, and it was held that there must be a concurrence of the minds of the parties on a distinct proposition manifested by an overt act; that the sending of a letter announcing consent to the proposition is a sufficient manifestation of concurrence to consummate the contract; that where the offer is by letter or by telegram, the acceptance signified in the same manner is sufficient, irrespective of the time when it comes to the proposing party; that an agreement to communicate by telegraph creates no warranty by either party that the telegrams shall be duly received; that proof of the sending of a telegram, and of the sending by mail of a letter accepting the proposition of the defendants, is a sufficient subscription to take the case out of the statute of frauds.

The question, at what particular point a contract by correspondence becomes fixed and irrevocable, is learnedly discussed by MARCY, J., in *Mactier v. Frith*, 6 Wend. 103, and the proposition declared, that where one sends an offer by mail, and the other party mails a letter in conformity with the offer accepting the same, the contract is perfected and irrevocable from the time of mailing the letter. And this, as already said, *supra*, note 5, is now the settled law. The Chancellor in the same case, in the Court of Chancery, held, that the contract was not perfected until the acceptance of the offer was made known to the party making it. But the decree was reversed by the Court of Errors, and the leading opinion delivered by Mr. Justice MARCY, reviewing all the learning from the Roman civil law, through the continental law-writers and the common law of England, to the present day. The later case of *Brisban v. Boyd*, 4 Paige, 17, adopts the view taken in the Court of Errors. And *Trevor v. Wood*, *supra*, in the Court of Appeals, decides that the same rule applies to contracts consummated by correspondence by telegraph. See also *Frosser v. Henderson*, 20 U. C. Q. B. 438.

⁷ *Dunning v. Roberts*, 35 Barb. 463.

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sent by himself, and will be regarded as a memorandum in writing, under the statute of frauds, to the extent of the words sent.

10. The general question of the party assuming the responsibility of the transmission of messages by telegraph is illustrated by some of the cases incidentally, in allowing the party to whom the message is sent to maintain an action for damages, on the ground that he had been misled and had thereby suffered loss, where it might have been claimed, that if the party sending the message were bound by it, in the form in which it reached the person to whom it was addressed, he would have been benefited rather than damnified, inasmuch as he would by the error have secured a much larger sale than he would otherwise have done.⁸ But we think the true distinction, in regard to the party entitled to bring the action, where any default in transmitting a message by a telegraph company arises, must rest upon the distinction which everywhere obtains in actions on the case: 1. That the contracting party may maintain the action against the company, on the ground of breach of contract, as well as for any breach of duty as public servants. 2. Those who are injured by their neglect of duty as public servants offering to serve faithfully all who may have any interest or connection with their operations, may have an action on the ground of a virtual tort in failing to perform this general duty of faithful and careful servants. This seems to us to be well illustrated by the case last cited. The sender of the message might have maintained an action to recover all the damage he sustained by an over order being sent to his

⁸ *New York & Washington Printing Telegraph Co. v. Dryburg*, 35 Penn. St. 298. In this case the message was for two hand-bouquets; the operator not reading the word "hand" correctly, but calling it "hund," added "red," making the order for "two hundred bouquets." The florist procured a large quantity of expensive flowers, which the party giving the order refused to accept, and he brought his action against the telegraph company for the damage, and it was sustained.

The English courts have recently qualified the rule laid down in *Dunlop v. Higgins*, 1 H. L. Cas. 381, that where an offer is made by one party for the acceptance of the other through the mail, the contract is binding as soon as the letter containing the acceptance is posted, by saying that this rule holds only where the acceptance reaches the other party. *British & American Telegraph Co. v. Colson*, Law Rep. 6 Exch. 108. But this qualification does not seem fully established, and the former rule is acted on in *Harris's Case*, 20 W. R. Cal. 90; s. c. Law Rep. 7 Ch. Ap. 587, and the case in the Court of Exchequer is doubted or denied.

correspondent. On the other hand, the correspondent was not *obliged to forward the two hundred bouquets and collect pay for them of the man who never intended to order them. He was not obliged to compel such man to become his debtor, but might recover all his damages, if he so elected, of the party whose default and negligence caused them.

11. We must state briefly the points which have been decided in other cases. It was early decided, that where the party sending a message signs a paper handed him by the company at the time, upon which is written or printed a notice that messages of consequence ought to be repeated from the station to which they are addressed, and that a higher rate is charged for repeated messages, and that the company will not be responsible for mistakes in unrepeatd messages, he will be bound by the notice, the limitation being regarded as reasonable, and, if not, it is at least such a limitation as the defendants may properly annex to all their undertakings.⁹

12. A similar condition is contained in most of the bills upon which messages are required to be written by those desiring to send them by American telegraph companies. (a) And so far as

⁹ *M'Andrew v. Electric Telegraph Co.*, 33 Eng. L. & Eq. 180; s. c. 17 C. B. 3; *Wann v. Western Union Telegraph Co.*, 37 Mo. 472. In *Wolf v. Western Telegraph Co.*, 62 Penn. St. 83, it was held that a notice on the blank forms of the company that it would not be liable for any damages accruing from any default in transmitting messages, unless claim therefor was made within sixty days after sending the message, was binding on those who sent messages on such forms; and the fact that the notice was in small type, the heading leading to it being in conspicuous type, would not excuse them from making the claim within the time specified.

(a) Where one delivers to a telegraph company a message written on a printed blank furnished by the company, which contains the terms on which the company proposes to transmit messages, the delivery is an acceptance of such terms and constitutes a contract. *Womack v. Western Union Telegraph Co.*, 58 Tex. 176; *Young v. Same*, 65 N. Y. 163. And a regulation limiting the liability of the company for unrepeatd messages is valid. *Passmore v. Western Union Telegraph*

Co., 78 Penn. St. 238; *Becker v. Western Union Telegraph Co.*, 11 Neb. 87. But *contra*, *Western Union Telegraph Co. v. Blanchard*, 68 Ga. 299; *Same v. Tyler*, 74 Ill. 168. But while the company may limit its liability for errors in transmission and delivery, it cannot more than a carrier so relieve itself from liability for its own negligence, as such a regulation is contrary to public policy. *White v. Western Union Telegraph Co.*, 14 Fed. Rep. 710; *Womack v. Same*, 58 Tex. 176;

we know, the courts have in this country followed the English decision already referred to. In the last case cited a query is made how far the company in such case will be responsible for gross neglect. We think there ought to be no doubt in regard to the responsibility of the company in such cases for even ordinary neglect. And the whole extent to which such a condition should be held to qualify the responsibility of the company, is that it will not be held absolutely responsible, as insurer of accuracy in transmitting messages, unless repeated and paid for as such.

13. This is the only ground upon which such a company could be held responsible as insurers, as this is the only mode in which perfect certainty of accuracy can be secured. And if the sender desires to secure perfect accuracy, he should so state, and pay accordingly, as it seems to us. This construction will reconcile the cases and the conflicting *dicta* in regard to the question how far telegraph companies are to be regarded as common carriers.¹⁰

¹⁰ Thus, in the case cited in note 9, the company is spoken of by JERVIS, C. J., as a "carrier," and therefore entitled to annex any reasonable condition to its responsibility as insurers. And in *Parks v. Alta California Telegraph Co.*, 13 Cal. 422, it is expressly decided that telegraph companies are common carriers. While in *Birney v. New York & Washington Telegraph Co.*, 18 Md. 341, the company is held responsible for all reasonable diligence to transmit the message correctly, but is not regarded as a common carrier, but as performing a service for others according to its established rules; and that such

Telegraph Co. v. Griswold, 37 Ohio St. 301. Thus, in *Breese v. United States Telegraph Co.*, 48 N. Y. 132, it was held that telegraph companies are entitled to make reasonable regulations for the conduct of their business, and may limit their liability to such mistakes as are caused by gross negligence or wilful misconduct. Hence, the sender of an unrepeatable message, written on a blank limiting the liability of the company on such messages to the charge for sending, cannot recover more for a mistake unless caused by fraud or gross negligence. *Grinnell v. Western Union Telegraph Co.*, 113 Mass. 299. But

as to delay in delivery, see *Western Union Telegraph Co. v. Fenton*, 52 Ind. 1. For failure to deliver a repeated message, the company will be liable for all damage actually resulting therefrom. *Western Union Telegraph Co. v. Brown*, 58 Tex. 170. The company may also limit its liability on half-rate messages. *Jones v. Western Union Telegraph Co.*, 18 Fed. Rep. 717; *Schwartz v. Atlantic & Pacific Telegraph Co.*, 18 Hun, 157. But not so as to relieve itself from the consequences of negligence. *Candee v. Western Union Telegraph Co.*, 34 Wis. 471; *Hibbard v. Same*, 33 Wis. 558.

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* 14. In a recent case in Pennsylvania,¹¹ where the plaintiff in error was employed by the defendant in error to send a message

rules bind the employer, if known to him, or he has the means of knowing them, when they form part of the contract and undertaking of the company; but that the notice of exception as to the company's responsibility for unrepeated messages will not excuse the company where the operator forgot the message and made no effort to transmit it.

And in *New York & Washington Printing Telegraph Co. v. Dryburg*, 35 Penn. St. 298, it is also declared, that telegraph companies are not responsible as common carriers and insurers of the correct transmission of their messages, but that their responsibility is similar to that of common carriers; and that if they negligently or wilfully violate their duty of sending the very message ordered to be sent, they are responsible in damages to the party injured. The corporation, it is here said, is liable in *tort* for the misconduct of its agent, although not appointed under the seal of the corporation, if the act be done in the ordinary course of his service or duty. And even when the sender did not pay for repeating the message according to the standing rules of the company duly published, this will afford no excuse for the company where the operator added to the message left an important matter, making it read differently, and, in fact, to be an entirely different message.

These cases sufficiently show that if the companies annex no conditions to their undertaking, they will be bound to perform in the same careful and faithful manner that other careful and skilful men in that department do such business; that if a message is left and paid for as a single transmission, the sender, or those interested in the sending, will be expected to assume what risk necessarily attends such transmissions, after diligent and faithful effort to accomplish the duty; that as there is but one sure test of the accuracy of messages being sent, that is, by repeating them, one who desires to secure that, or whose business is so important as to make that desirable, will be expected to so inform the company and pay for the insurance.

There are some few early cases not falling precisely within these rules perhaps; but they are not of much weight. In *Brown v. Lake Erie Telegraph Co.*, 1 Am. Law Reg. 685, a case in the Ohio Common Pleas, it was decided at a jury trial, that telegraph companies are responsible for all mistakes or errors in the transmission of messages by them, unless from causes beyond their control. This is treating their responsibility as precisely of the same character as that of common carriers, which makes them insurers of the faithful transmission of their messages. If that were so it would justify their taking the only course sure to result in absolute certainty, and repeating every message, and charging accordingly. It seems as if the telegraph companies, by reversing their rule in regard to repeating messages, might secure complete indemnity to themselves against claims for damages, when their agents conduct with entire fidelity. Thus by repeating every message and charging for the double

¹¹ *United States Telegraph Co. v. Wenger*, 55 Penn. St. 262.
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to * New York for the purchase of stocks, the message being pre-paid, and the operator informed at the time that the company would be held responsible for any failure in the transmission, it was held that having failed to transmit the message, they were responsible for the amount lost by the advance in the price before the actual purchase, made upon a later message. In a case of this kind, there would have been the fullest justification on the part of the company in requiring pay for repeating the message, as the only means of insuring certainty.

15. In a case in Massachusetts,¹² it was held that telegraph companies might limit the measure of their responsibility for errors in the transmission of messages, by reasonable rules and regulations brought home to the knowledge of the other party. And where the blank upon which the message is written contains, as part of the terms upon which messages are received for transmission, a statement, that every important message should be repeated (at half the price of the original charge), in order to secure certainty of accuracy, and that the company would not be responsible for any error in the transmission of an unrepeatable message, beyond the price paid for its transmission, unless a special agreement for insuring the same be made in writing, and an error occurs in transmitting the message, which is also delivered upon a similar blank, and there is no request to have it * repeated, the company are not responsible beyond the amount paid for transmission.

16. It seems to be almost universally recognized by the courts, that telegraph companies are not responsible as common carriers, (b) but only according to the nature of their undertaking transmission, unless otherwise ordered, they would know whether the risk of transmission was with them or their employers. And if the message were repeated, at the very moment of transmission, it would by no means cause the same increase of labor or time as the transmission of a distinct message.

The repeating of a message does not secure one from errors in reading the original order for the message. But the sender may easily insure the correct reading of his message, by requiring the operator to read it aloud to him at the time of delivery.

¹² *Ellis v. American Telegraph Co.*, 13 Allen, 226.

(b) It is, however, in some respects like a common carrier, and bound to perform the service it undertakes promptly and skilfully. *Western Union Telegraph Co. v. Hope*, 11 Brad. 289. On payment or tender of the usual charges it is bound to transmit any message couched in decent language

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and the character of the business, and that they may establish any reasonable rules and regulations limiting their responsibility to their own lines, and to repeated messages,¹³ subject only to the reasonable qualification that no such rules or regulations shall have the effect to screen the company from the consequences of their own default or misconduct.¹⁴

17. The rule of responsibility of telegraph companies seems to be as correctly laid down in a case in Kentucky as in any other.¹⁵ It was here held, that one who sends a message under

¹³ *Western Union Telegraph Co. v. Carew*, 15 Mich. 525. This was an action to recover damages for the incorrect transmission of a message from Detroit to Baltimore. The message was written on a blank, on which was printed a notice calling attention to certain regulations printed on the back, and requested the sending of the message subject thereto. Among other conditions was the condition that the company would not be responsible for errors or delay in the transmission of unrepeatable messages; that an additional charge would be made for repeating messages; and that it would assume no responsibility for errors or delay on the part of any other company over whose lines the message might be sent. The plaintiffs' lines extended only to Philadelphia, to which place the message was correctly sent. The defendant never read the regulations, had never had his attention called to them, and did not in fact know that the message would pass over any other lines. It was held that telegraph companies, in the absence of statute, were not common carriers, and that their liabilities and responsibilities were to be fixed by considerations growing out of the nature of the business in which they were engaged; that they do not become insurers against errors in the transmission of messages, except so far as, by their rules and regulations or by contract, they choose to assume that position; that in such a case as this the printed blank was a general proposition to all persons of the terms and conditions on which messages would be sent; that these terms and conditions were reasonable, and that by writing the message and delivering it to the company the defendant in error accepted them.

¹⁴ *Mann v. Western Union Telegraph Co.*, 37 Mo. 472. In *Rittenhouse v. Independent Telegraph Line*, 44 N. Y. 263, it was held to be *prima facie* evidence of negligence, as against the company, that it failed to transmit the message correctly, and imposed on the company the burden of proving that the failure happened without fault on its part.

¹⁵ *Camp v. Western Union Telegraph Co.*, 1 Met. Ky. 164. This case is supported by many of the cases before referred to, and by some others more

and given to its agent for that purpose. *Western Union Telegraph Co. v. Ferguson*, 57 Ind. 495. See *Breese v. United States Telegraph Co.*, 48 N. Y. 132. Not the highest degree of care in the transmission of messages, but at least ordinary care, is necessary. *Western Union Telegraph Co. v. Fontaine*, 58 Ga. 433; *Pope v. Western Union Telegraph Co.*, 9 Brad. 283; *White v. Same*, 14 Fed. Rep. 710.

the * knowledge of the ordinary notice, limiting the responsibility of the company for unrepeatd messages, as already stated, is presumed * to assent to its binding obligation, as it is both reasonable and just, and such as the company had the right to prescribe as the price and measure of its responsibility, and that a party acting under it, who does not have his message repeated, will be regarded as sending the same at his own risk, and the company will not be liable for damages resulting from a mistake not occasioned by negligence or want of skill in the agents of the company.

18. In the case of the New York, Albany, and Buffalo Telegraph Company *v. De Rutte*,¹⁶ it was decided, in regard to messages going beyond the line of the first company, that where the first company takes the compensation for the entire distance, it

or less directly. Thus in *New York, Albany, & Buffalo Telegraph Co. v. De Rutte*, 5 Am. Law Reg. N. S. 407; S. C. 1 Daly, 547, the same rule is laid down, with the qualification that knowledge of this limitation of responsibility by the company must be brought home to the sender. But this knowledge will be presumed in many cases, as, where the sender signs a bill containing such notice, he will be presumed to have knowledge of its contents, as that is within his power, and therefore becomes his duty. So also where such a condition from its innate fitness may be presumed to suggest itself to all persons as the only ground on which such companies could safely undertake for the perfect accuracy of the transmission of messages, or by which it could be secured by any one, it will be the duty of the sender, and equally of the receiver, to see that his message is or has been repeated, or else to understand that he assumes the necessary hazard in regard to possible inaccuracies in all unrepeatd messages. And where such a practice becomes universal in the business of telegraphing, its notoriety will affect all with presumptive notice, since all men who allow themselves to have anything to do with any general business are bound to inform themselves in regard to those rules affecting its transaction, which by common consent are of such reasonableness and necessity as to have become of universal acceptance. And as all persons connected with any business are bound to understand its elementary principles, so they will be presumed to do so. This rule of construction is of such universal application, that, in the construction of written contracts, it is always assumed that both parties understand these elementary laws of the business which is the subject-matter of the contract, and that they intend to contract with reference to those laws and in subordination to them, unless the express terms of the contract are in irreconcilable conflict with those laws. In such cases only can it fairly be assumed by courts that the parties intended to contract in disregard and in defiance of the universal laws of the business. These principles are considered, and substantially confirmed by *Breese v. United States Telegraph Co.*, 45 Barb. 274.

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thereby engages for the due delivery of the message at its destination, unless it expressly limits its responsibility to its own route, or the circumstances are such as clearly to indicate that such was the understanding of the parties. It is here said the telegraph company are not strictly common carriers, but their responsibility is analogous and to be measured by the application of analogous principles, but not always to the same extent. We see no reason why the responsibility of the first company for the entire route may not fairly be measured by the same analogies as that of common carriers of passengers, which will be found sufficiently discussed in another place. There is a well-considered case in Upper Canada bearing upon this point, decided by a divided court, but it * would seem that the opinion of the majority of the court followed the analogies applicable to passenger carriers more closely than that of the dissenting judge.¹⁶

¹⁶ In *Stevenson v. Montreal Telegraph Co.*, 16 U. C. 530, the defendants, a Canadian company, owned a telegraph line extending to Buffalo only, but in its printed handbills advertised its line as "connecting with all the principal cities and towns in Canada and the United States;" and it received the charge for transmission to places beyond its line. The plaintiff had some flour in the hands of N., his agent at New York, and about 3 p. m., on November 23, delivered to the defendants at Hamilton, a message addressed to N., paying the charge to New York, saying, "Am disposed to realize, — sell 1,500 barrels." Nothing was then said as to its importance, or as to the necessity for immediate despatch, and as the defendant's line was out of order it was not sent till after five on the following afternoon, which was Saturday. The defendants' operator received it at Buffalo, and on the same day delivered it at the office of the American company, paying their charge. It was not received by the plaintiff's agent in New York until after business hours, on the 28th, and in the mean time the price of flour had fallen materially. The agent, therefore, did not sell, but held the flour about a month, and as the market had continued to fall it then realized nearly five dollars a barrel less than could have been obtained when the message was sent. In an action for negligence in transmitting and delivering the message at New York, the jury found for the defendants, and on motion for a new trial it was held that the verdict must stand, for the only negligence shown was in delivering the message at New York, and if defendants were liable for that they would not be answerable for loss caused by a fall in the market, but, under the evidence, for nominal damages only; ROBINSON, C. J., and MCLEAN, J., saying that the defendant could not be held for delay beyond its own line, being bound only to transmit to Buffalo, and then hand over to the other company and pay charges on; BURNS, J., saying the company was liable as on an undertaking to transmit to New York and deliver there.

19. There has been considerable discussion in the courts in regard to the proper rule of damages, in case of the default of telegraph companies in sending messages correctly. (c) It has been claimed, that, by reason of the ignorance of the company, in most instances, of the importance of messages sent along their line, there is no properly defined rule of damages, and no measure of the diligence or responsibility of the company, and no standard by which they could properly measure their charges so as to include the proper premium for insurance.¹⁷

* 20. But we do not apprehend there will really be any difficulty in such companies securing themselves against all reasonable hazard, by the use of suitable caution in assuring themselves, at the time of receiving a message, that they understand the correct reading of it. For after that, it is always in their power to know with absolute certainty whether it is correctly transmitted, by having it repeated back. And as we have before said, if the sender do not choose to be at this expense he will then assume all risk of the transmission, so that in either case all the company really require to render their business entirely safe, is, to be sure they understand the message left with them, which is not attended with any necessary uncertainty. (d)

¹⁷ Opinion of JERVIS, C. J., in *MacAndrew v. Electric Telegraph Co.*, 33 Eng. L. & Eq. 180, 185; s. c. 17 C. B. 3.

(c) For a failure to deliver, the company is liable for such damages only as naturally flow from the breach of contract, or as may fairly be supposed to have been in contemplation of the parties. *Barnesville First National Bank v. Western Union Telegraph Co.*, 30 Ohio St. 555. For delay in a message ordering immediate shipment of stock, the measure of damages is the depreciation in value during the period of delay in arrival of the stock. *Manville v. Western Union Telegraph Co.*, 37 Iowa, 214. Where one telegraphed for a certain sum of money, and by mistake the message transmitted called for a greater sum, which was sent, whereupon the person to whom it was sent absconded, the com-

pany was held not liable for the amount of the loss, as the error was not the proximate cause. *Lowery v. Western Union Telegraph Co.*, 60 N. Y. 198. But where the despatch relates to other than business matters, the recovery should not be limited of necessity to nominal damages. *Gulf, Colorado, & Santa Fe Railway Co. v. Levy*, 12 Am. & Eng. Railway Cas. 96. *SoRelle v. Western Union Telegraph Co.*, 55 Tex. 308; *Logan v. Same*, 84 Ill. 468.

(d) But where a cipher message is sent the company will be liable in case of error for nominal damages only, unless it is advised of the import of the message. *Western Union Telegraph Co. v. Martin*, 9 Brad. 587.

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21. The rule of damages then will be a plain one. The company must make good the loss resulting directly from any default on their part. We see no reason why the ordinary rule should not be applied to cases of this character, as that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach.¹⁸ It is here said, that it is only uncertain and contingent profits which the law excludes, and not such as, being the immediate and necessary result of the breach of contract, may be fairly supposed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to established market rates. This same rule of damages has been applied, in the state of New York, to cases of failure to send messages by telegraph companies according to their duty and undertaking.¹⁹

22. We do not apprehend there is any valid objection to the application of this rule of damages to the case of telegraph companies, on the ground of the secrecy and reserve with which such correspondence is commonly conducted, and that consequently the companies have not in most cases any sufficient data to form any just appreciation of the extent of the responsibility. The rule is not based so much upon what is supposed to have been the actual expectation of the parties, as what it ought to have been under the circumstances, if their minds had been drawn towards the contingency of a failure in performance. And if one or both the * parties choose to enter into the contract, in such ignorance of the facts as not to have been capable at the time of estimating the real extent of the responsibility assumed, that can be no sufficient ground to exonerate him from the full extent of responsibility attaching to the contract. The rule of responsibility is the same for all who freely enter into the same contract, whether fully or correctly informed of the extent of the obligation or not, provided they are not misled by the opposite party.

23. There is one point decided in a somewhat early case²⁰ upon this subject, which seems to us exceedingly reasonable; that if, when the party sending a message for the purchase of goods

¹⁸ *Griffin v. Colver*, 16 N. Y. 489.

¹⁹ *Landsberger v. Magnetic Telegraph Co.*, 32 Barb. 530.

²⁰ *Washington & New Orleans Telegraph Co. v. Hobson*, 15 Grat. 122.

learns that by mistake the amount ordered has been enlarged in the transmission of the message, and in consequence his agent has purchased many times more than he directed, he still retains the whole amount purchased, he cannot recover any loss which accrues beyond what would have been experienced upon an immediate sale; and if he sends the commodity to another market for purposes of speculation, with the intention of taking to himself the profits, if any should arise, and in the event of loss visiting it upon the company, he cannot recover for any loss sustained. For, by adopting the purchase in that mode, he makes the act of the company in transmitting the message enlarged, his own, and he cannot accept the excess purchased both for himself and the company at the same time. He must elect at the time, whether to regard the excess of the order as purchased for himself or the company, and dispose of it accordingly. The points decided in the last case cited will repay repeating here, as they have a very sensible bearing upon questions of damage arising in this class of actions.²¹

* 24. There are some manuscript cases bearing upon the question of damages in actions against telegraph companies for default in transmitting messages, which it may be well to state.²² In the

²¹ In an action against a telegraph company for damages for alteration of a message, whereby an order to a factor in Mobile to buy 500 bales of cotton was altered to 2,500, there being no charge of negligence, it was held that an instruction that the defendants were not responsible as common carriers, but only as general agents, for such gross negligence as in law amounts to fraud, was not authorized by the pleadings, and properly refused; that the measure of damages was what was lost on the sale at Mobile of the excess of the cotton above that ordered, or, if not sold there, what would have been the loss on the sale of the cotton at Mobile in the condition and circumstances in which it was when the mistake was ascertained, — including in such loss all the proper costs and charges thereon; that the commissions of the factors on the purchase were to be included as a part of the damages; that the plaintiffs, if they intended to hold the company responsible for the excess of the purchase, should immediately have notified the company thereof, made a tender of the excess to the company on the condition of its paying the price and all the charges incident to the purchase, and intimated that in case of its refusal to accept the tender and comply with its conditions, they would proceed to sell the excess at Mobile, and, after crediting the company with the net profits, hold it liable for the difference between the amount of the proceeds and the cost of the excess, including all proper charges.

²² *Lockwood v. Independent Telegraph Line Co.*, before DALY, J., a judge whose decisions have weight when authoritatively reported.

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* former of these cases it is said to have been held, that where a merchant in New York ordered a message sent, "Stop sewing pedal braid till I see you," and it was delivered, "Keep sewing," &c., and from the error a large quantity of braid was manufactured into unfashionable shape, which the merchant received and disposed of in the best manner, he was entitled to recover the whole loss sustained in consequence of the error. And the same rule was adopted in the case secondly cited above.²²

25. Where the statute imposes a penalty for refusing to send a message across the line of the company, to be recovered by the person contracting, it was held that where one directed a message sent by one company to a point beyond their own line, and the first company, at the end of their line, tendered the message to the next company on the line for transmission, which was refused, such person was not the person contracting or offering to contract with the second company; but that the action to recover the penalty should have been in the name of the first company.²³

* 26. In England, and in many of the American states, telegraph companies are required to serve all who desire it, on such reasonable terms as shall be prescribed by the company for the regulation of their business, making no discrimination or prefer-

²² There is a case, *Rittenhouse v. Independent Telegraph Line*, 1 U. C. L. J. N. S. 247, reported as decided in the Common Pleas, New York, 1 Daly, 474; S. C. 44 N. Y. 263; *supra*, note 14, where by mistake in sending a message for 5,000 sacks of salt, "sacks" was called *casks*, which were sent accordingly, and had to be sold at a loss, it was held the company was responsible for the loss on the resale and the freight. In *Leonard v. New York, Albany, & Buffalo Telegraph Co.*, 41 N. Y. 544, it was held that a telegraph company is not excused from liability for an erroneous transmission of a message, by the fact that its meaning was unintelligible to the company, so long as the words were plain. It is also here reported to have been held, that, when an order is sent by telegraph for the purchase of one article, and by a blunder of the operator the despatch is made to read as an order for another, the company must make good any difference between the price paid for the article actually ordered, if purchased as soon as the error is discovered, and the price at which it could have been purchased when the despatch was received. But the company is not liable for a loss on a resale of the article under the erroneous despatch, unless the company has had fair notice of such resale. *Leonard v. New York, Albany, & Buffalo Telegraph Co.*

²³ *Thurn v. Alta Telegraph Co.*, 15 Cal. 472. But see *United States Telegraph Co. v. Gildersleve*, 29 Md. 232.

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ence in favor of or against any one.(e) But where one contracted with a telegraph company to collect public intelligence and send it over their line exclusively, the company to pay him fifty per cent of the charge of transmission for collecting it, or, in other words, to transmit it for half price, it was held that this was no violation of the English statute, requiring companies to do business for all, "without favor or preference," it being regarded by the court as a legitimate mode of compensating the party for collecting the intelligence, and for bringing custom to the company.²⁴ And it has also been decided, that the statutory prohibition against disclosing the secrets of the office or communicating messages does not extend to a disclosure as a witness in a court of justice.²⁵ The wonder is that any one should ever have supposed that such a disclosure could incur a penalty under the statute.

27. There are some few other points, of rather a miscellaneous character, which have been decided in regard to the rights, duties, and liabilities of telegraph companies, which we shall state very briefly. We have before noticed some cases bearing upon the relative rights pertaining to highways and telegraph companies, under the subject of Eminent Domain and Highways. It seems to be settled in England, that placing telegraph * posts in the highway without legislative authority will be ordinarily treated as a nuisance, unless placed in some position inaccessible to ordinary travellers, even when not placed in the travelled or central portion of the highway.²⁶ So, also, when a telegraph company without any parliamentary powers laid down their wires in tubes under a highway, an information and bill was filed, complaining of this as a nuisance to the public, and an invasion of the rights

²⁴ *Renter v. Electric Telegraph Co.*, 6 Ellis & B. 341.

²⁵ *Hensler v. Freedman*, 2 Pars. Eq. Cas. 274.

²⁶ *Regina v. United Kingdom Electric Telegraph Co.*, 9 Cox, C. C. 174; s. c. 6 Law T. N. s. 378; s. c. 31 Law J. N. s. Magistrates Cases; *supra*, § 109.

(e) A telegraph company cannot be compelled, however, to furnish a "ticker" to an office in which gambling grain contracts are made. *Bryant v. Western Union Telegraph Co.*, 17 Fed. Rep. 825. Nor is it the duty of a company to collect and send out market reports, and though it contracts to do so, the contract may be terminated, and the company may refuse to enter into another. *Metropolitan Grain & Stock Exchange v. Mutual Union Telegraph Co.*, 11 Bissell, 531. See *supra*, note (c).

of the adjacent land-owner. But the court refused to grant an injunction until the rights of the parties had been established at law.²⁷ And where telegraph companies are allowed by legislative grant to lay down their lines along a highway, they are still bound to see that no injury happens to passers along the highway, from the defective or imperfect condition of the instruments used by them, whether posts or wires.²⁸ It was here decided that in such cases the company will be responsible for damages to an individual, caused by the erection of the telegraph along the highway, if improperly made, or if suffered to fall down and be out of repair, although the travelled part of the way is not thereby obstructed. In this case the plaintiff was a passenger upon a stage-coach, which was upset by coming in contact with the wires of the company, in consequence of the decay and swaying over of the posts and the lowering of the wires thereby, although not across the travelled part of the highway. In one case²⁹ the plaintiffs were the owners of a telegraph cable lying at the bottom of the sea between England and France. The defendants were aliens, and their ships, while sailing upon the high seas, more than three miles from the English coast, lowered an anchor and injured the cable. It was held that the court would presume that the masters of the ship knew of the existence and situation of submarine cables, and that a duty was thereby cast upon all masters of ships to manage their vessels so carefully and skilfully as to avoid (if possible, by the exercise of reasonable precaution) injuring these cables. The extent of the duty of maintaining secrecy among the operatives and employés of the telegraph companies * whose employment brings them acquainted with the contents of messages sent or received, is of great importance. This is in many of the states secured by the imposition of penalties for disclosure. But we apprehend that no security will be available in any such sense as to render this mode of communication safe and comfortable, unless it be either the religious sense of duty, or at the least a sense of moral honesty and honor, which should lead one to speak the truth and to keep the truth, when that becomes

²⁷ *Attorney-General v. United Kingdom Electric Telegraph Co.*, 30 Beav. 287; s. c. 8 Jur. n. s. 583.

²⁸ *Dickey v. Maine Telegraph Co.*, 46 Me. 483; s. c. 8 Am. Law Reg. 358.

²⁹ *Submarine Telegraph Co. v. Dickson*, 15 C. B. n. s. 750; s. c. 10 Jur. n. s. 211.

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a duty.³⁰ There can be no question of the duty of the most inviolable secrecy in regard to all messages sent or received by telegraph companies. And unless this can be secured it will very essentially abridge the extent of their business. There is a duty in all employments to keep the secrets of the business, but more especially in one where such extensive correspondence is conducted.³¹ There is one decision in regard to these companies by the Supreme Court of Nova Scotia,³² which has more bearing upon the question of currency than any other. By the terms of the lease of the plaintiff's line to the defendants, payments are to be made for rent in "dollars and cents of United States currency." A question arose whether the treasury notes, made lawful money in the United States by subsequent act of Congress, could be regarded as coming fairly within the terms of the lease, the value of the United States currency being thereby greatly depreciated. The court held that notes were not a legal tender on the lease for rent. This decision unquestionably meets the equity and justice of the case, but whether it meets the law is, perhaps, * more questionable. We have come to regard that act as entirely within the constitutional powers of Congress, although a most awful experiment to visit upon a commercial country like our own, and one which foreign courts would look upon as altogether inadmissible under the circumstances in which it was adopted. But if its adoption was doubtful, its continuance seems more so, after the emergency which called it into existence has passed away. Where a telegraph company has obtained per

³⁰ It has been observed of late that women are more generally employed in telegraph offices than formerly, and especially on the other side of the Atlantic. This has been attributed to the higher sense of truth and honor among that sex than the other.

³¹ In *Tipping v. Clark*, 2 Hare, 393, WIGRAM, Vice-Chancellor, said, that every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk. See also Prof. Dwight's excellent article on the law of this subject, 4 Am. Law Reg. n. s. 193, 206, and cases cited, which have been of great assistance in the preparation of this chapter. But the duty of not disclosing the contents of messages does not extend to criminal cases, nor probably to civil causes, when the law requires their disclosure. *State v. Litchfield*, 10 Am. Law Reg. n. s. 376; s. c. 58 Me. 267; *Henisler v. Freedman*, 2 Parsons, 274.

³² *Nova Scotia Telegraph Co. v. American Telegraph Co.*, 4 Am. Law Reg. n. s. 365.

mission to establish their posts through any town or city, by decision of the municipal authority, and such posts are thus established within the limits of the highway, this settles, conclusively, the rightfulness of their erection, so that they cannot subsequently be removed by such municipal authority, or treated as a public nuisance.³³ In one case it seems to have been considered by the judge, that telegraph companies could not be held responsible beyond the amount paid, for any defect in transmitting a message, because the operation was liable to be affected by atmospheric influences; and also because the message was so expressed as to be unintelligible to the operator, and he could not be supposed to comprehend its value.³⁴ This latter might possibly be some excuse for not holding the company responsible for any large sum beyond the cost of the message. But it is generally expected that a message of a commercial character is of more value than its cost, or it would not be sent. And we know of no other case where atmospheric influences are considered as relieving these companies from responsibility for not correctly transmitting messages. The rule of admitting telegrams purporting to be in reply to those sent, on the ground that they must have been authorized by the parties whose names they bear, is naturally somewhat liberal.³⁵ But telegrams sent by the wife of a co-defendant are not evidence against any of * the defendants.³⁶ Morse's patent is vindicated and its infringement declared in a very elaborate case in the United States Supreme Court.³⁷

28. There is one case,³⁸ which seems to cover many of * the

³³ *Commonwealth v. Boston*, 97 Mass. 555.

³⁴ *Shields v. Western Telegraph Co.*, 9 West. L. J. 283. See also *Kinghorn v. Montreal Telegraph Co.*, 18 U. C. Q. B. 60, as to special damages not being recoverable in ordinary cases of this character. In *Law v. Montreal Telegraph Co.*, 7 U. C. C. P. 23, where the plaintiff sent his ship to take a cargo of wheat between two points, supposing, by mistake of the company, he could have 8,000 bushels, instead of 3,000, the actual number, he was held entitled to recover the expense of sending his ship and returning, but not the loss by taking a freight of 3,000 instead of 8,000 bushels.

³⁵ *Taylor v. The Robert Campbell*, 20 Mo. 254.

³⁶ *Benford v. Sanner*, 40 Penn. St. 9.

³⁷ *O'Reilly v. Morse*, 15 How. 62.

³⁸ *De Rutte v. New York Telegraph Co.*, 1 Daly, 547; *supra*, note 15. It was there decided that the contract for the transmission of a telegraphic message is not necessarily made with the person by whom it is sent; that if the person to whom it is addressed is the one interested in its correct and diligent

questions which have arisen upon this subject. The high character of the court, although one of subordinate jurisdiction, * and the very satisfactory manner in which the question was disposed of, seem to justify a statement here of the points decided.

29. Where a telegraphic company is established from one point to another, having secured the exclusive right of using its mode of operation, a court of equity cannot restrain another company from dividing the business between those two points by means of transmitting messages by a circuitous route, by another mode of operating which does not infringe the patent of the first company.³⁹

transmission, and by whom the expense of sending it is borne, he will be regarded as the person with whom the contract is made; that the business of telegraph companies, like that of common carriers, is in the nature of a public employment, as they hold out to the public that they are ready and willing, on payment of charges, to transmit intelligence for any one, and not for particular persons only; that common carriers are held to the responsibility of insurers for the safe delivery of property intrusted to their care, on grounds of public policy, to prevent fraud and collusion with thieves, and because the owner, having surrendered the possession of his property, is generally unable to show how or where the loss or injury occurred; that these reasons do not apply to telegraph companies, and that they are not held to the responsibility of insurers for the correct transmission and delivery of intelligence; that as the value of their service, however, consists in the message being correctly and diligently transmitted, they necessarily engage so to transmit, and if there is an unreasonable delay, or an error committed, it is presumed to have originated from negligence, unless they show that it occurred from causes for which they are not answerable; that they may qualify their liability to the effect that they will not be answerable for errors unless a message is repeated, but this condition must be brought home to the knowledge of the person who brings the message for transmission; that where a telegraph company is paid the whole compensation for the transmission of a message to a place beyond its own lines, with which it is in communication by the agency of other companies, it will be regarded as engaging that the message shall be transmitted to, and delivered at that place, unless there is an express stipulation to the contrary, or the circumstances are such as to show that the understanding of the contracting parties was otherwise.

But independent of contract, if a person is put to loss and damage through the negligence of a telegraph company, in transmitting to him an erroneous despatch, the company will be liable to him in an action for negligence; and if it received the whole compensation for sending it, it will be liable though the error was made by one of the companies through whom the despatch was transmitted.

³⁹ *Western Telegraph Co. v. Magnetic Telegraph Co.*, 21 How. 456; *Same v. Penniman*, 21 How. 460.

30. The law requires messages to be transmitted in the order in which they are received, promptly and faithfully. And where a party left a message: "Come by the night train," and paid the price of the transmission, and was assured it would be done at once, and it was delayed till the next morning, when it was of no importance, he was held entitled to recover the penalty of \$100, under the Indiana statute for voluntary neglect of duty by telegraph companies, unless the delay were caused by the exception in the statute in favor of communications for and from officers of justice.⁴⁰

31. In another case the following points were determined. A clause in the printed regulations of a telegraph company, that they will not be responsible for mistake or delay in the transmission of a message, applies only to the transmission of the message, and not to mistakes or delay in its delivery after it has been correctly transmitted. The plaintiff sent a message to the defendants' office in New York, directed to an attorney in Providence, R. I., directing him to attach a house and lot in the latter city, of one B., who was then temporarily absent from Rhode Island, for a debt of \$12,000 due from B.'s firm to the plaintiff. The message was brought to defendants' office at half-past eight P. M., the office *being then closed for the transaction of ordinary business. Their agent was told that the message was important; that unless it was sent and delivered at once, it would be of no use; that the object of the message was to get an attachment upon property in Providence; that unless it was made before the Stonington train reached the Rhode Island state line, it would do no good. The defendants' clerk answered the plaintiff's messenger, that the message would be sent and delivered as requested, and that he would not take the money if he thought there was any doubt about it. The message was sent at ten minutes past nine, P. M., with directions from the operator in New York to send it in haste, and was received by the operator in Providence at half-past nine, who was then engaged in receiving reports for the press, which by statute have precedence over all other matters. The Provi-

⁴⁰ *Western Union Telegraph Co. v. Ward*, 23 Ind. 377. And where by arrangement between connecting companies one transmits all messages from the other to points beyond its line, the second company will be responsible to the sender for any default in transmissions. *Baldwin v. United States Telegraph Co.*, 54 Barb. 505.

dence operator answered, that it could not be sent that night, as the delivery boy had gone home, to which the other answered that it must be, and the former replied by a sign expressing his concurrence. The Providence operator was engaged without cessation in receiving newspaper reports until half-past eleven o'clock P. M., when he had the message copied and sent to the attorney. When the attorney received it, it was too late to have the attachment made before the arrival of B., who returned to Rhode Island in the Stonington train that morning, and the plaintiffs lost the advantage of securing their debt by an attachment upon B.'s house and lot, which was worth over \$12,000. B.'s firm afterwards went into bankruptcy, and all that the plaintiffs recovered upon their debt from the bankrupt estate was \$500. Held, that the plaintiffs were not bound to exhaust their legal remedy against their debtors by the recovery of a judgment and the issuing of an execution, before bringing an action against the telegraph company for their damages; that the measure of the damages was the amount of the debt and interest from the day of the delivery of the message, less the five hundred dollars received from the bankrupt estate of B.'s firm. The measure of damages should not be confined to the cost of sending the message and expenses incidental thereto.⁴¹

32. One state has decided that the legislation of Congress of 1866, in regard to telegraphic communication, amounts to assuming its control, as a matter of interstate commerce, under the United States Constitution, which rendered all state legislation granting exclusive privileges upon the subject inoperative, and that consequently an exclusive grant from the state to the plaintiff could not be enforced against the defendants by injunction.⁴² (g)

⁴¹ *Bryant v. American Telegraph Co.*, 1 Daly N. Y. 575.

⁴² *Western Union Telegraph Co. v. Atlantic & Pacific States Telegraph Co.*, 5 Nev. 102.

(g) As respects its foreign and interstate business, a telegraph company is, as an instrument of commerce, subject to the regulating power of Congress; and hence, when it has accepted the provisions of the Federal Revised Statutes, state laws impos-

ing a tax on messages to go out of the state, or sent by a federal officer on public business, are unconstitutional. *Telegraph Co. v. Texas*, 105 U. S. 460. See *State v. Western Union Telegraph Co.*, 73 Md. 518.

PART X.

**THE LAW OF REMEDIES IN EQUITY AND BY INDICT-
MENT IN REGARD TO RAILWAYS.**

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THE LAW OF REMEDIES IN EQUITY AND BY INDICTMENT IN REGARD TO RAILWAYS.

*CHAPTER XXIX.

EQUITY JURISDICTION IN REGARD TO RAILWAYS.

SECTION I.

Injunctions against Railway Companies.

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| 1. Courts of equity will not assume the control of railway construction. | exceeding powers, or acting on powers which have expired. |
| 2. Will restrain company from taking lands by indirection. | 7. Injunctions to enforce the payment of compensation for land. |
| 3. Will restrain company, when exceeding its powers. | 8. But injunction suspended, on assurance of payment by a short day. |
| 4. If company has power to traverse highways, board of surveyors cannot stop it. | 9. Course of practice in equity must conform to change of circumstances. |
| 5. They should apply to the courts. | 10. Course of proceeding in American courts of equity the same. |
| 6. Equity will restrain company from | |

§ 205. 1. INJUNCTIONS in courts of equity, to restrain railways from exceeding the powers of their charters, or committing irreparable injury to other persons, natural or artificial, have been common for a long time in England and in this country.¹ But the courts of equity will not undertake to determine questions of engineering, and take the construction of a railway under their own control, in order to keep the company within its powers.¹ (a)

¹ Webb v. Manchester & Leeds Railway Co., 1 Railw. Cas. 576; s. c. 4 Myl. & C. 116.

(a) Thus the court will not enjoin the construction by a railway company on its own land of an embankment necessary to make its road-bed safe, though it has slipped and seems likely to slip further on the land of an adjoining proprietor, and thereby to ruin a spring. Rider v. New York, West Shore, & Buffalo Railway Co., 65 How. Pr. 419.

A question of engineering is ordinarily referred to a disinterested engineer,¹ and in such case the court bases its order upon the report of such engineer.¹

2. The courts of equity will enjoin a railway from taking land, ostensibly under their powers, for one purpose, when in fact they desire it for another not within their powers.¹ (b) In all cases of doubt in regard to the extent of the powers of the company, the conclusion should be against its exercise, and the company should go to the legislature instead of the courts to have their powers enlarged.¹

* 3. In an early case,² it was held by the Vice-Chancellor, that the fact that the company were proceeding to take lands, after their powers had expired, was no ground of interfering by injunction, unless it were shown that irreparable mischief would otherwise ensue. But the Lord Chancellor held, in the same case, that where it is clearly shown that a public company is exceeding its powers, this court cannot refuse to interfere by injunction.³

4. It has been held, that in a parish through which a railway * is granted, with the right to traverse the highways of such parish, or alter their levels, on restoring them to their former usefulness or substituting others to the acceptance of the board of surveyors of such parish, and, if that is not done, the board of surveyors to cause it to be done, it is not competent for such board to take the law into their own hands, and put up fences, so as to obstruct the passage of engines across the highways, on the ground that their passing endangered the safety of the public.⁴

² *River Dun Navigation Co. v. North Midland Railway Co.*, 1 Railw. Cas. 185. The general ground on which courts of equity will interfere, by injunction, in the case of railways, to keep them within their charter powers, is very fully stated in this case, by Lord Chancellor COTTENHAM.

³ Directors of a limited company will not be restrained from going into business and exercising their borrowing powers until the whole of the nominal capital has been subscribed and every share allotted. *M'Dougal v. Jersey Imperial Hotel Co.*, 2 Hemm. & M. 528; s. c. 34 Law J. Ch. 28.

⁴ *London & Brighton Railway Co. v. Blake*, 2 Railw. Cas. 322.

(b) And where a company institutes proceedings to condemn the road and track of another *de facto* company, with the fraudulent purpose of getting possession thereof, without making compensation, an injunction will issue. *Cincinnati, Lafayette, & Chicago Railroad Co. v. Danville & Vincennes Railway Co.*, 75 Ill. 118.

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5. It was considered that the board of surveyors, in such case, should have applied to a court of law to award a mandamus, requiring the railway company to construct the substituted highways in the proper mode, or to a court of equity, for an injunction to effect the same object.⁴ In such case it was held that the right of the surveyors was a private right, and that they were in no way interested in the question of public safety.⁴

6. Injunctions have been granted against companies proceeding to take land contrary to the provisions of their charter,⁵ or where their powers had expired.⁶ But where the company had rightfully purchased a lease of the land, and were rightfully in possession, a court of equity will not restrain them from proceeding to take the fee, upon the ground that they have no such power under their charter, as such proceeding would, upon the assumption, convey no title to the company, and there would be no necessity or propriety in withdrawing the determination of the mere question of title from the courts of law, whenever it shall arise.⁶

7. But where the company had taken possession of lands and begun their works, before paying or depositing the stipulated price, according to the requirements of their charter, it was held proper to restrain them by injunction, and also to dissolve the injunction, upon payment of the price into the Court of Chancery, where the land-owner had chosen to come for redress, although the company's act required the deposit in the Bank of England, in case the title was disputed, as in the present case.⁷ (c)

⁴ *Stone v. Commercial Railway Co.*, 4 Myl. & C. 122; *River Dun Navigation Co. v. North Midland Railway Co.*, 1 Railw. Cas. 135.

⁵ *Mouchet v. Great Western Railway Co.*, 1 Railw. Cas. 567. See *supra*, § 97.

⁷ *Hyde v. Great Western Railway Co.*, 1 Railw. Cas. 277. And in such case it is not necessary, in a bill for specific performance of a contract of sale of the land to the railway company, to make others having an interest in the land, as tenants, for instance, parties to the bill. *Robertson v. Great Western Railway Co.*, 10 Sim. 314; s. c. 1 Railw. Cas. 459.

(c) An injunction seems generally to be a proper remedy where the company fails to pay the land damages according to the provision therefor. See *Provolt v. Chicago, Rock Island, & Pacific Railroad Co.*, 69 Mo. 633; *White v. Nashville & Northwestern Railroad Co.*, 7 Heisk. 518; *Irish v. Burlington Southwestern Railroad Co.*, 44 Iowa, 380; *Evans v. Missouri & Nebraska Railway Co.*, 64 Mo. 453; *Diedrichs v. Northwestern Union Railway Co.*, 33 Wis. 219. But where the claim is for consequential

* 8. In a case where the Court of Chancery considered that the company had taken possession of land without paying the price, according to the true construction of the contract between them and the owner, they held the party entitled to redress by way of injunction. But, upon the company stipulating to pay the price by a short day, the injunction was suspended to give them opportunity to do so, the company undertaking that if this is not done the court shall regard the injunction as of the day of the arrangement.⁸

9. The rule laid down by Lord Chancellor COTTENHAM, and repeated in several cases, that it is the duty of the courts of equity (and the same is true of all courts and of all institutions) to "adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights, for which there is no other remedy," is certainly worthy of the ablest, the wisest, and best judges who ever administered the chancery law of England or America.⁹

10. That similar rules of practice prevail in the American courts of equity will appear from an examination of the cases upon this subject. It was held the court will not interfere by injunction unless the danger is imminent and the damage irremediable.¹⁰

⁸ *Jones v. Great Western Railway Co.*, 1 Railw. Cas. 684. In Maryland it is sufficient ground for an injunction to prevent a railway company from entering on lands, that it has not paid or secured the damages. And an averment in the bill of irreparable injury is not required. *Western Maryland Railroad Co. v. Owings*, 15 Md. 199.

⁹ *Taylor v. Salmon*, 4 Myl. & C. 141; *Mare v. Malachy*, 1 Myl. & C. 559; *Walworth v. Holt*, 4 Myl. & C. 619-635.

¹⁰ *Spooner v. McConnel*, 1 McLean, 338; *Rochester v. Curtis*, 1 Clarke,

damages to land no part of which is taken, an injunction will not issue to restrain the operation of the road until the damages are paid. *Stetson v. Chicago & Evanston Railroad Co.*, 75 Ill. 74; *Patterson v. Chicago, Danville, & Vincennes Railroad Co.*, 75 Ill. 588. And in *Remshart v. Savannah &*

Charleston Railroad Co., 54 Ga. 579, it was held that an owner whose land had been taken several years before could not have an injunction on assessment and non-payment of damages, but must resort to his ample legal remedies by execution or ejectment.

But the cases where courts of equity have interfered to prevent threatened mischief¹¹ and injury without reparation,¹² (*d*) are very numerous in the American reports of chancery decisions.

336. See also *Jerome v. Ross*, 7 Johns. Ch. 315; *Sutton v. Southeastern Railway Co.*, Law Rep. 1 Exch. 33; s. c. 11 Jur. n. s. 935.

¹¹ *McArthur v. Kelley*, 5 Ohio, 139.

¹² *Bonaparte v. Camden & Amboy Railroad Co.*, 1 Bald. 221; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Stevens v. Buckman*, 1 Johns. Ch. 318; *Amelung v. Seekamp*, 9 Gill & J. 468; *Ross v. Paige*, 6 Ohio, 166; *Browning v. Camden & Woodbury Railroad Co.*, 3 Green, 47; *Jarden v. Philadelphia, Wilmington, & Baltimore Railroad Co.*, 3 Whart. 502; *Chapman v. Mad River & Lake Erie Railroad Co.*, 6 Ohio St. 119.

Courts of Chancery have jurisdiction to proceed, by injunction, where public officers, under a claim of right, are proceeding illegally and improperly to injure or destroy the real property of an individual or corporation, or where it is necessary to prevent a multiplicity of suits, although the defendants may be sued at law.

As where the commissioners of highways, on the petition of the defendant, had laid out and recorded a private road or way from a lot of defendant, across the ropes and fixtures of the inclined plane of a railway, which was used for the drawing up or letting down cars, for the conveyance of merchandise or passengers. *Mohawk & Hudson Railroad Co. v. Artcher*, 6 Paige, 83. See also *Belknap v. Belknap*, 2 Johns. Ch. 463; *Livingston v. Livingston*, 6 Johns. Ch. 497.

The courts of equity will often interfere, by injunction, in cases of nuisance, and, where the right is clear and the wrong manifest, they will do so without waiting the result of a trial at law. But where the thing complained of is not in itself a nuisance, but only capable of becoming such by relation, the courts of equity will not ordinarily interfere, in that mode, until the matter has been tried at law. Where, however, the magnitude of the threatened injury bears no just proportion to the probability of its being justifiable, the court will not refuse its aid presently. *Mohawk Bridge Co. v. Utica & Schenectady Railroad Co.*, 6 Paige, 554; *Bell v. Ohio & Pennsylvania Railroad Co.*, 25 Penn. St. 181. So also where a railway is being constructed so near a canal, having a prior grant, as seriously to endanger the works of the latter, this being first settled by an issue at law. *Hudson & Delaware Canal Co. v. New York & Erie Railway Co.*, 9 Paige, 323; *In re Long Island Railroad Co.*, 8 Edw. Ch. 487.

In *Sandford v. Catawissa, Williamsport, & Erie Railroad Co.*, 24 Penn. St.

(*d*) This principle has in some of the states, as in New York, been embodied in statute. But independent of statute it is of course a settled principle of equity, and would seem to require no reference to the cases that are to be found everywhere in support of it. See *Metropolitan Elevated Railroad Co. v. Manhattan Railway Co.*, 65 How. Pr. 277. But the statutes of some of the states, e. g., Indiana, do not go quite so far. *Clark v. Jeffersonville Railroad Co.*, 44 Ind. 248.

*SECTION II.

Injunctions to protect the Rights of Land-Owners, and of the Company.

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| 1. Company restrained from taking less land than specified in notice.
2. Injunction sometimes refused, where great loss will ensue.
3. Nor will an injunction issue to try constitutionality of the company's charter. | 4. It will issue to restrain the company from carrying passengers beyond the limits of its road.
5. So also from taking land beyond the reasonable range of deviation.
6. But not where the company has the right to take the land. |
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§ 206. 1. In accordance with the opinion of the Lord Chancellor, in note 2 (a) to the last section, it has been held, that,

378, it is said: "If railway corporations go beyond the powers which the legislature has given them, and in a mistaken exercise of those powers interfere with the property of individuals, the court is bound to interpose by bill, injunction, or otherwise as the case may require." *s. r.* *River Dun Navigation Co. v. North Midland Railway Co.*, 1 Railw. Cas. 135; *Agar v. Regent's Canal Co.*, Cooper, 77. An injunction will not be granted to prevent a corporation from enforcing an assessment, by declaring its proceedings illegal, where the consequences would be injurious to the corporation and of no substantial benefit to the complainants. See *Jones v. Newark*, 3 Stock. 452, where this subject is ably discussed.

In *Tucker v. Cheshire Railroad Co.*, 1 Fost. N. H. 29; *s. c.* 1 Am. Railw. Cas. 196, it was considered material to the inquiry, whether the defendants' bridge so interfered with a former toll-bridge across the Connecticut River as to justify an injunction, that railway communication was not in use at the date of the plaintiff's grant, and that it could not therefore have been in the contemplation of the legislature to exclude it, and that a railway bridge did not subserve the same purpose for which the toll-bridge was erected.

And in *Newburyport Turnpike Co. v. Eastern Railroad Co.*, 23 Pick. 326, it was held, that a statute, giving railway companies the power to raise or lower any turnpike or way, for the purpose of having the railway pass over or under the same, will justify a railway in raising a turnpike-road to enable them to pass it on a level, and an injunction was denied.

And where the charter gave the company the right to construct lateral routes, it was held that a shareholder could not restrain the company from

(a) Where the invasion of the plaintiff's rights is merely technical, and threatens no serious injury, — trespass land, for instance, a preliminary injunction will not issue. *Wakeman v. New York, Lake Erie, & Western Railroad Co.*, 35 N. J. Eq. 496.

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where * the company gave notice to take a certain quantity of land, and subsequently proceeded to summon a jury to estimate a less quantity, * they should be restrained from proceeding by injunction at the suit of the land-owner, the notice to treat consti-

the exercise of such powers as were conferred by the charter, and in the manner therein specified, on the ground that it would diminish his dividends, or impair the resources of the company; and that where the charter fixes no limit of time for the exercise of such powers, the court will not ordinarily prescribe one. But such grants must be express, and will not be implied. *Newhall v. Chicago & Galena Railroad Co.*, 14 Ill. 273.

In *Morgan v. New York & Albany Railroad Co.*, 10 Paige, 290, it was held, that an injunction which is to deprive the officers of a corporation of the control of all its property, will not be allowed *ex parte*.

In cases of great injury and where irremediable mischief will be likely to ensue, injunctions are commonly allowed *ex parte*, and the defendant may move to dissolve before answer. *Minturn v. Seymour*, 4 Johns. Ch. 173. See also *Poor v. Carleton*, 3 Sumner, 70; *New York Printing & Dyeing Establishment v. Fitch*, 1 Paige, 97.

But in cases of importance, involving no pressing peril, an *ex parte* injunction should not be granted. Accordingly one was denied, to restrain defendant from running a steamboat and landing passengers at the plaintiff's dock. *New York Printing & Dyeing Establishment v. Fitch*, *supra*. So also to take from the directors of a bank the control of its business, on the ground that their election was obtained by fraud. *Ogden v. Kipp*, 6 Johns. Ch. 160. See also *Stewart v. Little Miami Railroad Co.*, 14 Ohio, 353; *Ramsdell v. Craig-hill*, 9 Ohio, 197; *Walker v. Mad River Railroad Co.*, 8 Ohio, 88.

But where, by special act, a railway was required to pass through a certain street, thereafter to be laid, on certain conditions, and not in any parallel street, the company was enjoined from entering private land, for the purpose of locating its road, until the street prescribed in the act should be opened. *Jarden v. Philadelphia, Wilmington, & Baltimore Railroad Co.*, 3 Whart. 502. So also from condemning any land, which, by its charter, they have no power to take. *Moorhead v. Little Miami Railroad Co.*, 17 Ohio, 340.

But where the defendant had addressed letters to the plaintiff, stating the terms on which he would allow the railway to be carried over his land, and the company commenced operations on the land, in conformity with the propositions and with the knowledge of defendant, it was held that plaintiff had thereby accepted the defendant's proposition, and was bound by its terms, and that the same was consequently binding on defendant, citing *Mactier v. Frith*, 6 Wend. 103, 119. The plaintiff having substantially performed the contract, and the defendant having shut up the road, after it had been used several months, a perpetual injunction was granted against defendant obstructing the road, but without prejudice to any claim he might have against the plaintiffs. *New York & New Haven Railroad Co. v. Pixley*, 19 Barb. 428.

tuting the relation of vendor and purchaser between the company and land-owner, as to all the land included in the notice.¹ (b)

2. In one case, Lord COTTENHAM, Chancellor, declined interfering on behalf of a land-owner, although the possession of the land had been obtained from a tenant of the plaintiff, by the company, by means of circumvention and fraud. The ground of the refusal seems to have been, that the road having been already built, the effect of the injunction prayed for would be to turn the defendants out of the use of it, and virtually put it into the plaintiff's control. The Lord Chancellor says: "The case originally may have been a case of waste,—waste occasioned by the cutting of the tram-road and the laying of the iron rails over the plaintiff's land, but what is now claimed by the defendants is simply a right of way; and if they are not entitled to that right, they are mere trespassers, and * the plaintiff has his proper legal remedy against them as such."²

¹ *Stone v. Commercial Railway Co.*, 1 Railw. Cas. 375; s. c. 4 Myl. & C. 122. But in *Hedges v. Metropolitan Railway Co.*, 28 Beav. 109, it was held that the notice of a railway company to take lands cannot be considered more obligatory than contracts, and, after great delay in proceeding on such notices, they will be considered as abandoned. And in *King v. Wycombe Railway Co.*, 28 Beav. 104; s. c. 6 Jur. N. S. 239, it was held that the notice to treat alone, not followed by any act to obtain possession, was not a contract binding on the company. And in *Mouchett v. Great Western Railway Co.*, 1 Railw. Cas. 567, the Vice-Chancellor declined to restrain the company from assessing the value of the fee-simple in land, on the ground that the company was not authorized to take such estate, as in that case the proceedings would be merely void, and it was not claimed that the company was not entitled to the present use and occupancy of the land, or that it was so using it as to cause irreparable injury to the inheritance. See *Lund v. Midland Railway Co.*, 34 Law J. Ch. 276; *Mason v. Stokes Bay Pier & Railway Co.*, 32 Law J. Ch. 110.

² *Deere v. Guest*, 1 Myl. & C. 516. But see *Warburton v. London & Blackwall Railway Co.*, 1 Railw. Cas. 558. The plaintiff should satisfy the court that he has sustained substantial damage, from the violation of a legal right, to entitle himself to an injunction. *Holyoake v. Shrewsbury & Birmingham Railway Co.*, 5 Railw. Cas. 421. And, in general, we apprehend, courts of equity

(b) An injunction was refused to restrain a company which, having purchased the rights of owners of land adjacent to a road-bed, abandoned for seventeen years, was proceeding to grade and lay track, the petition being filed by a company which had purchased it before it was abandoned, and was operating another parallel line three miles distant. *Troy & Boston Railroad Co. v. Boston, Hoosac Tunnel, & Western Railroad Co.*, 13 Hun, 60.

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3. But where a land-owner threatened forcible resistance to the progress of the railway, the Court of Chancery declined to interfere.³ The Court of Chancery declined also to interfere at the suit of a land-owner, and enjoin a railway company from building their road, on the alleged ground of the unconstitutionality of the company's charter. It was held that the case must take the ordinary course of judicial proceedings, and for all preliminary purposes, and, until the hearing upon the merits, the constitutionality of the company's act would be assumed.⁴

4. But where the charter of a railway company gave them the exclusive right of carrying passengers and freight from Atlanta to Macon, it was held that the company could not, under their charter, carry from their station in Macon through the city to the station of another railway, for the convenience of their customers, and they were enjoined from so doing.⁵

5. And it was held, that a railway had no right to take land for a warehouse four hundred yards from their track, and build a track to such point, although the land requisite for both purposes did not exceed five acres, and the company were perpetually enjoined.⁶ (c)

will not enjoin the operations of railways and other public works, until after notice and opportunity to be heard on answer and affidavit. In such cases the answer of the corporation, under its corporate seal without oath, is not regarded as equivalent to the answer of a natural person on oath, but only as the answer of a natural person not on oath; and consequently as nothing more than a denial of the facts alleged in the bill, by way of plea, and not as of any force by way of evidence, and, therefore, not such a denial of the equity of the bill as to entitle the party to a dissolution of the injunction. *Bouldin v. Baltimore*, 15 Md. 18.

³ *Montgomery & West Point Railroad Co. v. Walton*, 14 Ala. 207.

⁴ *Deering v. York & Cumberland Railroad Co.*, 31 Me. 172. But the courts of equity will enjoin the company from taking lands for warehouses and other erections which are not authorized by their charter. *Bird v. Wilmington & Manchester Railroad Co.*, 8 Rich. Eq. 46.

⁵ *Macon v. Macon & Western Railroad Co.*, 7 Ga. 221.

⁶ *Bird v. Wilmington & Manchester Railroad Co.*, 8 Rich. Eq. 46. It was

(c) But where during the construction of a railway a dispute arises as to the true location under a written grant of way, and the matter is disputable and depends on parol evidence, the court will not issue a preliminary injunction, but will reserve the question for the final hearing, no injury being threatened which may not be compensated. But the court will require ample security for such damages as may be recovered. *Rainey v. Baltimore & Ohio Railroad Co.*, 15 Fed. Rep. 767.

6. But a court of equity will not enjoin a railway company from *constructing their road across the plaintiff's land, when the charter provides a mode for the land-owner to obtain an appraisal of compensation, and he has not resorted to it.⁷

SECTION III.

Equitable Interference with the Works.

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| 1. No universal rule as to equitable interference.
2. Matters often arranged by mutual concessions and an issue at law.
3. Cases illustrating the mode of proceeding in courts of equity. | 4. Charter requiring company to do least possible damage.
5. If the company remove a highway <i>ultra vires</i> , equity will not always compel its restoration. |
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§ 207. 1. In consequence of the discretion which courts of equity assume to exercise in regard to decreeing specific performance of contracts and obligations, or restraining the parties from violating the duties resulting therefrom, there will be likely to be more or less apparent inconsistency in the disposition of different cases. As no intelligible rule can be laid down upon the subject,

held in that case, that when the court entertains jurisdiction for the purpose of enjoining the company from the further use of land, it may grant compensation for the injury already committed, by reference to a master, or directing an issue, *quantum damnificatus*. And a railway company will be enjoined, after the completion of its road, from taking land from one person merely to enable them to carry out an agreement with another person. *Vane v. Cocker mouth Railway Co.*, 12 Law T. N. s. 821. And see *Flower v. London, Brighton, & South Coast Railway Co.*, 2 Drewry & S. 330; s. c. 11 Jur. N. s. 406; *Wrigley v. Lancashire & Yorkshire Railway Co.*, 4 Gif. 352; *Weld v. Southwestern Railway Co.*, 32 Beav. 340; s. c. 33 Law J. Ch. 142.

⁷ *New Albany & Salem Railroad Co. v. Connelly*, 7 Ind. 32. The defendants were raising a footway, under powers contained in local acts, in front of plaintiff's house, which would shut off his access to a warehouse, and otherwise damage his property. It appearing that defendants were authorized under their acts to alter the footway, and also that the plaintiff had sustained and would sustain injury thereby, an injunction was refused; but it was referred to chambers to ascertain and certify the amount of the injury and what would be a proper sum to be awarded as damages for such injury. *Wedmore v. Bristol*, 7 Law T. N. s. 459.

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it will be useful briefly to refer to the more important decided cases bearing upon the question.

2. Where a controversy arose between the land-owner and the company, in regard to the right of the company to occupy a highway by substituting another in a different direction, and which, * it was claimed, would very materially affect the value of the plaintiff's land for building purposes, by depriving him of access to the highway, the Vice-Chancellor held, that it was not a case for the interference of a court of equity, at least until the company had completed their substituted road. But the Chancellor considered it a case where the court should interfere, to enable the company to know at once whether the proposed road, when properly completed, would meet the requirements of their charter. For this purpose he granted a temporary injunction against occupying the old road, until the new one shall be completed, — the plaintiff undertaking to bring an action against the company, and the company admitting, for the purpose of the action, that they have taken the old road, and the plaintiff admitting that the substituted road is, in effect, completed, in order to try the question whether, when completed, it will be a proper substitution.¹ The company, in another case, were enjoined from the use of works erected on a site prohibited in their charter, but with liberty to

¹ *Kemp v. London & Brighton Railway Co.*, 1 Railw. Cas. 495. In this case, after the proposition of his lordship to send the case to the jury; on its being suggested by the counsel for the company, that the form of action would not inform them what kind of road they were bound to make, his lordship answered, "I am not about to direct an action, to try what sort of road the company are to make. The question before me is, whether the proposed road is such as, under the act, entitles them to take the old road." *Bell v. Hull & Selby Railway Co.*, 1 Railw. Cas. 616. The injunction was here retained until the rights of the parties should be determined by an action at law, to be brought for that purpose and tried under certain admissions. Where the deposited plans and sections specify the span and height of a bridge by which a railway is to be carried over a turnpike road, the company will not, in the construction of the bridge, be allowed to deviate from the plans and sections. *Attorney-General v. Tewkesbury & Great Malvern Railway Co.*, 1 De G. J. & S. 428; s. c. 9 Jur. n. s. 951. And see *Edinburgh & Glasgow Railway Co. v. Campbell*, 4 Macq. Ap. Cas. 570; s. c. 9 Law T. n. s. 157; *Attorney-General v. Dorset Railway Co.*, 9 W. R. 189; *Ware v. Regent's Canal Co.*, 3 De Gex & J. 212; s. c. 5 Jur. n. s. 25. And in Illinois it has been intimated that the same doctrine would be maintained. *Jacksonville & Savannah Railway Co. v. Kidder*, 21 Ill. 131.

use the erection, as before, upon their undertaking to erect no more, and to apply for a rehearing, or to prosecute an appeal to the House of Lords.²

* 3. In a case where the company were proceeding to arch over a street, in order to erect a station, it was held that they should be restrained by injunction, until the question of their right to do so should be settled in a court of law. And for this purpose an action was directed to be tried before the barons of the Exchequer, and their opinion being certified in favor of the right claimed by the company, "if it was necessary, or reasonably convenient for the construction of a station and proper warehouses," the Lord Chancellor held that the injunction should be dissolved, the fact of the commencement of the works by the defendants being sufficient proof of the necessity for, and the convenience of, such buildings.³ So, too, an injunction was continued temporarily against the trustees of a turnpike road, who proposed to remove stone blocks laid across their road by a railway company, in order to pass from their railway to a wharf occupied by them, for the convenience of loading and unloading goods upon railway carriages, the company not proposing to alter the surface of the turnpike road or to cross it by means of railway carriages. But upon notice being given to the trustees of the turnpike road, and the matter being discussed, both the Vice-Chancellor and the Lord Chancellor regarded the acts of the railway company as manifestly wrong, inasmuch, as by their act, they had no power to deal with the turnpike road at all for the mere purpose of access to their railway, but only to use it as it was; and if they proposed to cross it with their railway, they were bound, by the express terms of their act, to do so by means of a tunnel or a bridge, and that it was not proper to continue the injunction during the trial of the question at law.⁴

² *Gordon v. Cheltenham & Great Western Union Railway Co.*, 5 Beav. 229; s. c. 2 Railw. Cas. 800. It was held in this case that a party will not be precluded from relief, by acquiescence in what he may be led to consider a mere temporary violation of his right, where no evidence is given of expense incurred by another party, in faith of such acquiescence. *Clarence Railway Co. v. Great North of England, Clarence, & Hartlepool Railway Co.*, 2 Railw. Cas. 763. See *infra*, § 220, and cases cited; *supra*, § 160.

³ *Attorney-General v. Eastern Counties & Northern & Eastern Railway Co.*, 2 Railw. Cas. 823.

⁴ *London & Brighton Railway Co. v. Cooper*, 2 Railw. Cas. 312. It seems [*316]

So, too, where the company were by their act prohibited from erecting any station at a given point, but built a platform and stairs to enable them to take up and set down passengers, and proposed to build a road for access to such point, they were temporarily enjoined from the use of such erections, and the injunction was made *final upon hearing; the Vice-Chancellor considering that this, when the road was built, was a station, but that this prohibition did not prevent the company from stopping their engines where they pleased, and that the passengers might then get in, or out, as they best could.⁵

So, where the company were proceeding to build an arch over a mill-race, for the purpose of supporting an embankment, and it appearing that the mill would suffer damage if the arch were not built of larger dimensions, an injunction was granted to restrain the company from making over the mill-race an arch of less dimensions than what was requisite to secure the mill from injury, the company by their act being bound to make compensation to persons whose property might sustain damage.⁶

4. But where the company were, by their act, required to conduct their works, doing as little damage as possible, it was held,

to be the uniform practice in the English Railway Acts to require all road and farm crossings to be either by tunnels or bridges, or else to be protected by gates, under the control of the officers of the company, which are not allowed to be open while any train is due.

⁵ *Petre v. Eastern Counties Railway Co.*, 3 Railw. Cas. 367. But in *Eton College v. Great Western Railway Co.*, 1 Railw. Cas. 200, it is held, that a prohibition from building a station within three miles of Eton College, does not preclude the taking up and setting down of passengers within that distance, and renting rooms in a public-house for the convenience of such passengers.

⁶ *Coats v. Clarence Railway Co.*, 1 Russ. & M. 181. The extent of the requisite arch in this case was determined by the report of an engineer, to whom the question was referred. In *Manser v. Northern & Eastern Counties Railway Co.*, 2 Railw. Cas. 380, the Chancellor held, that, in a case where the affidavits on points of engineering are conflicting, the court will seek for professional assistance of some impartial engineer, to form a decision upon them. Where a railway company agreed with a land-owner not to erect any building, except the proposed railway, higher than thirty-three feet, on the land to be taken from him, the company was withheld from breach of this covenant by injunction; and it was held that the circumstance that a work to be made in breach of a local covenant is one of great public importance, is not sufficient to induce the court to refuse to restrain such breach by injunction. *Lloyd v. London, Chatham, & Dover Railway Co.*, 2 De G. J. & S. 568; s. c. 34 Law J. Ch. 401.

by the Lord Chancellor, that nothing but necessity could justify the company in carrying on their works in such a manner, or on such a level as would cause serious damage to the owner of the land.⁷ The maxim *Sic utere tuo ut alienum non lædas* applies to * persons acting under inclosure acts, and other acts of parliament of a similar nature.⁸

5. In an English case⁹ it was held, and with great wisdom as it seems to us, that where a railway company have diverted a public road, *ultra vires* but with a *bona fide* view to the convenience of the public, a court of equity will not compel them to replace the road, if that will cause greater inconvenience to the public, or the complaining section of the public, than to suffer it to remain as the company have placed it, without due warrant. The information in such case will be dismissed, but without prejudice to proceedings at law.

SECTION IV.

Further instances of Equitable Interference with Works.

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| 1. Equity in a clear case will direct the mode of crossing highways.
2. Mandamus the more appropriate remedy in such cases. | 3. Towns may maintain bill in equity to protect highways. |
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§ 208. 1. The subject of the interference of the courts of equity to enforce contracts between the promoters of railways and the land-owners along the proposed line, has been considered in a

⁷ *Manser v. Northern & Eastern Counties Railway Co.*, 2 Railw. Cas. 380. Some very sensible remarks fell from the Lord Chancellor in this case, in regard to the one-sidedness of testimony on points of engineering, and the embarrassment attending the trial of cases depending on such questions, unless the courts are enabled to command the aid of masters wise and experienced in regard to such acts as come in question. And see *Birmingham Water-Works Co. v. London & Northwestern Railway Co.*, 4 Law T. N. s. 398; *Dover Harbor v. London, Chatham, & Dover Railway Co.*, 3 De G. F. & J. 559; s. c. 7 Jur. N. s. 453.

⁸ *Dawson v. Paver*, 5 Hare, 415; s. c. 4 Railw. Cas. 81.

⁹ *Attorney-General v. Ely, Haddenham, & Sutton Railway Co.*, Law Rep. 6 Eq. 106.

former chapter.¹ Where a railway company were attempting to carry a turnpike road over their railway in a manner inconvenient to the public use of such road, an injunction was granted to restrain them from doing it in that mode, the Vice-Chancellor explaining in what mode the thing should be done, or what results were to be effected, to escape from the injunction.² (a) But this injunction * was granted, without prejudice to any application the company might make to the Board of Trade. But if the case is doubtful, as, for instance, a claim for land damages, the court will not ordinarily interfere, by injunction, but leave the party to pursue his claim at law.³

¹ *Supra*, § 8. See also *supra*, § 97, for further statement of grounds of equitable interference.

² *Attorney-General v. London & Southwestern Railway Co.*, 3 De G. & S. 439; *Hodges Railw.* 506; 13 Jur. 487. In *Attorney-General v. Dorset Railway Co.*, 9 W. R. 189; s. c. 3 Law T. n. s. 608, it appeared, by the plans and sections deposited by a railway company, that it intended to carry its road across a public way by means of a skew bridge. Instead of doing so, the company diverted the road for some distance, and afterwards restored it to its former course by means of a bridge which crossed the railway at right angles, thus forming two abrupt and dangerous curves. The court granted an injunction until further order, restraining the company from proceeding with the works, and directed that in the mean time a competent person should inquire and report whether any deviation was necessary, and, if so, how it could most conveniently be effected. See also *Attorney-General v. Tewkesbury & Great Malvern Railway Co.*, 1 De G. J. & S. 423; s. c. 9 Jur. n. s. 951. And where a local board of health withdrew its opposition to a railway bill, on the insertion in the act of a clause that no bridge carrying a road over the railway in their district, should have an approach with a slope of more than one in thirty, and to make such a slope required an encroachment on the land of another person, who obtained an injunction against it, and the company made the approach with a slope of one in twenty, it was held, on an information by the Attorney-General, that it was no excuse for departing from the requirements of the act, that the road could not otherwise be carried over the railway, and a mandatory injunction issued requiring conformity to the act. *Attorney-General v. Mid-Kent Railway Co.*, Law Rep. 3 Ch. Ap. 100.

³ *South Staffordshire Railway Co. v. Hall*, 1 Sim. n. s. 373; s. c. 3 Eng. L. & Eq. 105. See also *London & Northwestern Railway Co. v. Smith*, 1

(a) As to injunctions to restrain *Rock Island Railway Co. v. Schertz*, 84 Ill. 135; *Roelker v. St. Louis & Southeastern Railway Co.*, 50 Ind. 127. See further *supra*, § 76. *Patterson v. Chicago, Danville, & Vincennes Railroad Co.*, 75 Ill. 588; *Peoria &*

In some cases, where the company have given notice of purchase of lands, which, under the English statute, has the effect to create the relation of vendor and purchaser, but omit any further proceedings, the land-owner has been allowed a decree equivalent to specific performance.⁴

2. But the more usual remedy, in such cases, as we have seen, is by mandamus, and that, although an old jurisdiction is not taken away by a new remedy. Yet if a new *right* be given and a * special remedy provided for enforcing it, such remedy must be pursued.⁵

3. And it has been held, that where a railway claim to maintain their road upon a public highway, the town within which the highway is situated may sustain a bill in equity, for the purpose of trying the question of the right of the company, under their charter, to maintain their road in that place.⁶

Macn. & G. 216, 13 Jur. 417; *East & West India Docks & Birmingham Junction Railway Co. v. Gattke*, 3 Macn. & G. 155; s. c. 3 Eng. L. & Eq. 59.

⁴ *Walker v. Eastern Counties Railway Co.*, 6 Hare, 594; s. c. 5 Railw. Cas. 469. And where the contract contains stipulations, in regard to communications with other lands, and similar accommodations, the arrangement in regard to them will be determined by the master. *Sanderson v. Cockermouth & Workington Railway Co.*, 11 Beav. 497; s. c. 19 Law J. Ch. 503. But it has been held, that where the contract provides that the price of land shall be settled by an arbitrator, it is not such a contract as a court of equity will ordinarily enforce. *Milnes v. Gery*, 44 Ves. 400; *Adams v. London & Brighton Railway Co.*, 19 Law J. Ch. 557; 2 Macn. & G. 118. See also on this subject, *Morgan v. Milman*, 10 Hare, 279; s. c. 13 Eng. L. & Eq. 312; s. c. affirmed, 3 De. G. M. & G. 24; s. c. 17 Eng. L. & Eq. 203. And the party claiming specific performance must not be premature in his application, nor have been guilty of unreasonable delay. *Bodington v. Great Western Railway Co.*, 13 Jur. 144; *Southeastern Railway Co. v. Kuott*, 10 Hare, 122; s. c. 17 Eng. L. & Eq. 555.

⁵ *Supra*, § 81; *Adams v. London & Blackwall Railway Co.*, 2 Hall & T. 285; s. c. 6 Railw. Cas. 271, 282; *Williams v. South Wales Railway Co.*, 13 Jur. 443; 3 De G. & S. 354.

⁶ *Springfield v. Connecticut River Railroad Co.*, 4 Cush. 63. A railway company will not be restrained by injunction from stopping up an ancient highway, in a case where it is doubtful on the evidence whether the public right of way has not been extinguished by disuse or obstruction. *Freeman v. Tottenham Railway Co.*, 13 W. R. 335; s. c. 11 Law T. n. s. 702. In a well-considered case, *Chapman v. Mad River & Lake Erie Railroad Co.*, 6 Ohio St. 119, where the defendant, having received from private parties donations of land, subscriptions of stock, and payments in money, in consideration that it should build its road in a particular place, and allow private side tracks

SECTION V.

Injunctions to enforce Orders of Railway Commissioners.

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| 1. Importance of the functions of railway companies. | 2. Courts of equity will enforce, without revising, orders of railway commissioners. |
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§ 209. 1. The office of the former Board of Trade in England, and that of Railway Commissioners in many of the American * states, is the same as to railways. And in England, this office of the Board of Trade is now, or was for a time, performed by a board denominated The Railway Commissioners. The office of such commissioners, both in England and this country, seems to be, the protection of the public from abuses of railway companies. The jurisdiction of such commissioners is therefore of necessity confined to such matters as affect the public, and does not ordinarily extend to such private matters, in the management of railways, as affect the stockholders only in their pecuniary interests and relations. This result seems to follow almost of necessity from the very nature of the subject-matter. So far as the public security and convenience are concerned, both in regard to the transportation of passengers and freight and the carrying of parcels by express, these companies are public functionaries, so to speak, and as such, under the supervision and control of the public police, as much as other public officers; but in regard to their stock, and the management of their internal pecuniary functions, they are, to all intents, private companies, as much so as manufacturing or other mere business corporations.

and warehouse privileges in connection therewith, it was held, on a bill in equity praying an injunction, that the company should not be allowed to make a change in fact, though not in name, of the line of its road, so as to remove it from such place, by getting up a new company and constructing a new road parallel with its old one, under a different charter, and permitting its old line to go to decay, without compensating the parties with whom it had made such contract for the former location; and an injunction restraining the use of the new line not relieving the plaintiff, and it being questionable whether the company had the means of restoring the old line, and the new one being preferable, it was held a proper case for a decree for damages.

And a railway company is bound to indemnify a town for any alteration made in the highways of the town by the company. *Hamden v. New Haven & Northampton Co.*, 27 Conn. 158.

2. Courts of equity have sometimes lent their aid to prohibit railway companies from the violation of the orders of the railway commissioners, where the public security would be thereby endangered. This was done, in one case, where the railway commissioners, having inspected a railway about to be opened, directed the company to postpone the opening, and the company, notwithstanding, proceeded to open their road for business. The Attorney-General, as *parens patriæ*, applied for an injunction, which was granted; the Master of the Rolls, Sir J. ROMILLY, refusing to inquire into the sufficiency of the reasons which induced the commissioners to withhold their consent, saying that the company could apply to the Court of Queen's Bench for a mandamus to the commissioners to dissolve the prohibition, if they wished to try that question.¹ (a)

*SECTION VI.

Equitable Interference where Company has no Funds.

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| 1. English courts formerly restrained company from taking land, on failure of its funds.
2. Rule qualified by later cases, and now questionable. | 3. Equity will not interfere where company propose to complete but part of works. Remedy by mandamus. |
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§ 210. 1. The courts of equity seem, at one time certainly, to have considered the undertaking of the company to build the road, so far the equivalent for the privilege conferred upon them, of taking private property against the will of the owner, that if it were shown conclusively that the company never could complete their undertaking, they would restrain them by injunction from taking land under the powers granted them.¹ But in another

¹ Statute 5 & 6 Vict. c. 55, § 6; Statute 7 & 8 Vict. c. 85, § 17; Attorney-General v. Oxford, Worcester, & Wolverhampton Railway Co., W. R. 330; Hodges Railw., 671; *infra*, § 247.

¹ Agar v. Regent's Canal Co., Cooper, 77.

(a) But where the commissioners order two companies to act jointly in doing that which neither could do separately, the courts will restrain enforcement of the order. *Toomer v. London, Chatham, & Dover Railway Co.*, Law Rep. 2 Exch. Div. 450.

case,² Lord ELDON explains the ground of his former decision thus: "In *Agar v. The Regent's Canal Company*, I acted on the principle that where persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that that sum is not nearly sufficient, if the owner of an estate through which the legislature has given the speculators the right to carry the canal can show that the persons so authorized are unable to complete their work, and is prompt in his application for relief, grounded on that fact, this court will not permit the further prosecution of the undertaking." This, we apprehend, would at the present day require to be received with considerable allowance.

2. In another case,³ Lord COTTENHAM thus explains Lord ELDON's decision above: "I apprehend that Lord ELDON must have gone upon this ground, that, where acts of parliament impose certain severe burdens upon individuals, by interfering with their private rights and private property, for the purpose of obtaining some great public good, if the court sees that the undertaking cannot be completed, and that therefore the public cannot derive the benefit which was to be the equivalent for the sacrifice made by the public, the court will protect the individual from being compelled * to make the sacrifice, under the circumstances, and until it appears that the public will derive the proposed benefit from it." And even with this qualification, it seems to us that it would be impossible for a court of equity to exercise much control over these enterprises without virtually assuming a supervision over the doings of the legislature and the business of the country which would be impracticable and invidious. It is obvious, this purpose has been virtually abandoned in the English courts of equity.⁴

In the case of *Gray v. Liverpool & Bury Railway*,⁴ the Lord Chancellor declined to interfere, until the legal right was deter-

² *King's Lynn v. Pemberton*, 1 Swanst. 244.

³ *Salmon v. Randall*, 3 Myl. & C. 439.

⁴ *Blakemore v. Glamorganshire Canal Navigation*, 1 Myl. & K. 154; *Gray v. Liverpool & Bury Railway Co.*, 9 Beav. 391; s. c. 4 Railw. Cas. 235. In the last-named case the company, to induce the plaintiff to withdraw opposition, consented to incorporate into its act a provision, that the line should not come within a certain distance of a bridge named, without the plaintiff's consent. On examination it turned out that plaintiff owned all the land within the line of deviation from that point, so that the road could not proceed without the plaintiff's consent. The Master of the Rolls held that this could

mined in a court of law, if either party desired it, the injunction standing in the mean time to sustain all existing rights.

3. But a court of equity will not, it seems, now interfere, because a railway company do not propose to complete their entire line. The remedy in such case, if any, is by mandamus.⁵ A canal company were restrained by injunction from converting a canal, for erecting which the company were incorporated, into a railway.⁶ But where the directors of a railway company, with the concurrence of the * shareholders, on finding the original undertaking impracticable, proceeded to construct a small portion of the works, which were nearly completed, the court declined to interfere by injunction, at the instance of the minority of shareholders, on the ground of their acquiescence; they having known, or had the means of knowing, the progress of the acts complained of.⁷

make no difference even in the construction of the stipulation. The parties must be presumed to have understood the matter, and to have made their contract understandingly, and the court should not defeat it.

See also *Lee v. Milner*, 2 M. & W. 824, and the remarks of ALDERSON, B., limiting the right of a court of equity to restrain the company from proceeding to take land, to cases where it is evident it has virtually abandoned the enterprise, and has no longer any serious expectation of accomplishing it, which appears to be the only practicable ground on which equity could interfere. *Thicknesse v. Lancaster Canal Co.*, 4 M. & W. 472.

⁵ *Attorney-General v. Birmingham & Oxford Junction Railway Co.*, 4 De G. & S. 490; s. c. 3 Macn. & G. 453; 7 Eng. L. & Eq. 283. See *Regina v. Eastern Counties Railway Co.*, 10 A. & E. 531; *Cohen v. Wilkinson*, 12 Beav. 135, 138; s. c. 1 Hall & T. 554; 5 Railw. Cas. 741. Acts of parliament authorizing companies to make railways are regarded only as enabling acts which give powers, but do not render compulsory or obligatory the exercise of those powers. *Scottish Northeastern Railway Co. v. Stewart*, 3 Macq. Ap. Cas. 382.

⁶ *Maudsley v. Manchester Canal Co.*, Cooper Pract. Cas. 510.

⁷ *Graham v. Birkenhead, Lancashire, & Cheshire Junction Railway Co.*, 2 Macn. & G. 146; 2 Hall & T. 450.

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SECTION VII.

Equitable Control of the Management of Railway Companies.

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| <ol style="list-style-type: none"> 1. In general, equity will not interfere in matters remediable by shareholders. 2. Thus it will not interfere to restrain company from declaring dividend till works are finished. <ol style="list-style-type: none"> a. (a). But it will restrain the making of a dividend out of funds necessary for repairs. 3. Will interfere to enforce public duty sooner than to enforce private one. 4. Will restrain company from diverting funds to illegal use. 5. Equity will not interfere, on the assumption of the practical dissolution of company. The existence of a <i>de facto</i> board will be presumed. 6. Directors liable to same extent as other trustees. 7. Managing committee not chargeable with the fraudulent acts of its members. | <ol style="list-style-type: none"> 8. Equity will not enforce resolutions of directors, or company. 9. Suits in equity by minority against majority. 10. Suit in equity may be maintained by a single stockholder. 11. Necessary formal requisites of such a bill. 12. Directors not responsible for purchases made on credit of the corporation. 13. Minority may insist on continuing the business till charter expires. 14. Minority may have bill against directors for not resisting illegal tax. 15. Company may expend funds in resisting proceedings in parliament. 16. Equity will not compel directors to declare dividend, unless they willfully refuse. 17. Directors liable for good faith and reasonable diligence only. |
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§ 211. 1. There have been numerous instances of application to courts of equity to interfere in the control of the management of railway companies, in respect of their internal concerns. But as a general rule it is said,¹ whenever the acts complained of are capable of being rectified by the shareholders themselves, in the exercise of their corporate powers, equity will not interfere, but *leave questions of internal management and regulation to be settled by the shareholders in corporate meeting.² And es-

¹ *Hodges Railw.* 67. See *Howe v. Derrel*, 43 Barb. 504. Thus, in *Orr v. Glasgow, Airdrie, & Monklands Junction Railway Co.*, 3 Macq. Ap. Cas. 799; s. c. 6 Jur. n. s. 877, it was held that the directors are the servants of the company, not of each individual shareholder; and that if a shareholder is aggrieved by their misconduct, his course is to call on the company to bring the directors to account, and then to get relief from the company itself.

² See *Bailey v. Power Street Church*, 6 R. I. 491.

pecially is this the case where the act complained of is clearly within the power of the company.³

2. Hence it was held, that equity had no jurisdiction to restrain a railway company from declaring a dividend until their works were all completed, there being no provision in the acts to that effect.³ (a)

3. But courts of equity are far more ready, upon a bill properly framed, to interfere to enforce a public duty of a railway company, than a mere private duty.⁴

* *Brown v. Monmouthshire Railway & Canal Co.*, 13 Beav. 32; s. c. 4 Eng. L. & Eq. 113. But where the charter of a railway company provided, that unless certain portions of the work should be completed within a specified time, no dividend should be declared until the works were completed, so far as their ordinary shares were concerned, the company was enjoined from making any dividend contrary to the charter. *Allen v. Talbot*, 30 Law T. 316. But a railway company will be restrained at the information of a relator from carrying on a trade not authorized by the act constituting it. *Attorney-General v. Great Northern Railway Co.*, 1 Drewry & S. 154; s. c. 6 Jur. n. s. 1006. And where the articles of association of a company contained no power to issue preference shares, and the company in general meeting passed a resolution for the issue of some shares with a preferential dividend, the court, on motion for an injunction by three shareholders who did not attend the meeting, though they had notice, granted an injunction restraining the issue of such shares. *Hutton v. Scarborough Cliff Hotel Co.*, 2 Drewry & S. 514.

* In *Buck Mountain Coal Co. v. Lehigh Coal & Navigation Co.*, 50 Penn. St. 91, it was held that a bill in equity to enforce the performance of a public duty by a corporation cannot be maintained by a private party in the absence of any special right or authority. And where the slack-water navigation of the defendant, with dams, locks, and other appliances, was damaged, broken, and swept away by a flood, it was held that a bill in equity could not be maintained by another company to enjoin the corporation from neglecting to repair and put in operation its navigation; and that the plaintiffs had no right to a decree compensating it for damages sustained in consequence of the non-repair. The court intimated, however, that a bill might be maintained in behalf of the Commonwealth by the Attorney-General. And equity will not interfere by injunction to redress public nuisances, where the object sought can be attained by ordinary legal methods. *Jersey City v. Hudson*, 2 Beasley, 420.

The court will not grant an injunction to restrain a railway company from charging a carrier otherwise than equally with all other persons. *Sutton v. Southeastern Railway Co.*, Law Rep. 1 Exch. 33; s. c. 11 Jur. n. s. 935; 35

(a) But payment of dividends out don Tramways Co., Law Rep. 16 Ch. of money necessary to maintain re- 344. pairs may be enjoined. *Dent v. Lon-*

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* 4. So, too, as we have seen,⁵ they very often interfere to restrain companies of this kind from making use of their funds for a purpose wholly aside of the general object of their incorporation, and this will be done at the suit of shareholders, although a

Law J. Exch. 38; but see *Baxendale v. North Devon Railway Co.*, 3 C. B. n. s. 324. See *Jones v. Eastern Counties Railway Co.*, 3 C. B. n. s. 718; *Cooper v. London & Southwestern Railway Co.*, 4 C. B. n. s. 738; *Baxendale v. Great Western Railway Co.*, 5 C. B. n. s. 309; *Nicholson v. Great Western Railway Co.*, 5 C. B. n. s. 366.

A railway company will not be allowed to grant to an omnibus proprietor the exclusive privilege of carrying passengers between another town and one of its stations. *Marriott v. London & Southwestern Railway Co.*, 1 C. B. n. s. 499. But a company will not be enjoined from allowing a cab proprietor the exclusive privilege of plying within the station. *In re Beadell*, 2 C. B. n. s. 509. Even where it is charged that occasional delay and inconvenience are thereby caused to the public. *In re Painter*, 2 C. B. n. s. 702. There is one case, *Rogers's Locomotive Works v. Erie Railway Co.*, 20 N. J. Eq. 379, which illustrates the desperate shifts to which those who have the control of railways sometimes resort to enrich themselves and impoverish the companies, and equally the necessity of some efficient public control of the management of such business. The bill alleged that the defendant, being a common carrier, was bound to carry the plaintiff's freight at a certain rate fixed by law, and that for the purpose of evading such duty it procured the charter and organization of an express company, and entered into a contract with such company by which it was to have the exclusive privilege of transporting all plaintiff's locomotives, that company charging eight times as much as the defendant was allowed by law to charge; and that, in pursuance of that purpose the defendant refused to transport locomotives for the plaintiff, except through the express company, and to compel the plaintiff to acquiesce in its demands, the defendant detained a load of locomotives, together with plaintiff's trucks procured for the purpose of such transportation. The bill prayed an injunction to compel the defendant to return the trucks, and to continue to perform its duty as a common carrier in transporting plaintiff's freight at the rates fixed by law, and to restrain the express company and certain directors of both companies from making any agreement, or doing any act, to hinder the defendant from performing its duty. It was held that an injunction issue to restrain the express company, but not as to the mandatory orders prayed for on a preliminary motion.

⁵ *Supra*, § 56; *Bagshaw v. Eastern Union Railway Co.*, 7 Hare, 114. So may one or more shareholders file a bill on behalf of themselves and others against any officer who is diverting the funds of the company from their lawful use. *Salomons v. Laing*, 12 Beav. 377; 6 Railw. Cas. 152; *Edwards v. Shrewsbury & Birmingham Railway Co.*, 2 De G. & S. 587. See also *Grand Trunk Railway Co. v. Cook*, 29 Ill. 237. And the directors of a company will be restrained by injunction from improper issue of shares. *Fraser v. Whalley*, 2 Hemm. & M. 10.

majority may have sanctioned by their votes the act complained of.⁶ (b)

* In *Brown v. Monmouthshire Railway Co.*, 13 Beav. 32; s. c. 4 Eng. L. & Eq. 113, Lord LANGDALE, M. R., after some rather spicy but highly pertinent strictures upon the prominent disposition of these public companies to take advantage of every possible evasion, seemingly to gain time, to the serious damage of their own character for fairness, makes upon the merits of the bill a very prudent and comprehensive exposition of the general subject.

In *Henry v. Great Northern Railway Co.*, 1 De G. & J. 606; s. c. 30 Law T. 10, it is held that the holders of preference shares, as they are called in England, are entitled to have the company enjoined from declaring any dividend in favor of the ordinary shareholders, so long as the company remains liable to a deficit in its funds, caused by an officer of the company having defrauded it by forgeries. This case was affirmed in the Court of Chancery Appeal, 30 Law T. 141. See also *Gifford v. New Jersey Railroad & Transportation Co.*, 2 Stockt. Ch. 171. A minority of the stockholders of a corporation have a remedy in chancery against the directors, the corporation, and all others, individuals or corporations, to prevent a misapplication of the funds of the corporation in which they are interested. *March v. Eastern Railroad Co.*, 40 N. H. 548. Where, therefore, it was alleged in a bill that railroad A. had leased and entered on the track, furniture, fixtures, &c., of railroad B. for a term of years, and had agreed to pay B., as rents at stated times, a certain share of the income and profits of both roads; and also that such profits to a large amount had been received by railroad A., and had been accumulating for several years, A. refusing to pay according to the terms of the lease, and claiming to apply such profits in payment for investments in the stock of other corporations, and in other schemes of speculation not warranted by the terms of the lease; and that B. and its directors, being influenced by persons in the interest of A., had declined to take measures to collect the rents of A., but were consenting to such improper application of the funds, to which funds the complainants with the other stockholders were proportionately entitled as dividends on their stock, it was held on demurrer by A. that a minority of the stockholders of B. might maintain suit against their own directors and their own corporation, and also against A., the object of the suit being to prevent such misapplication of the funds, and to compel said A. to pay over its dues to B., and to compel B. to distribute the same as dividends among the complainants and others, its stockholders; but that in order to prevent a multiplicity of suits, and that justice might be done between all parties, such stockholders should set forth in their bill that it was brought not only for themselves, but in behalf of all others similarly interested, who might choose

(b) And where a company enters into an illegal transaction with another company, and makes an illegal payment out of its funds in pursuance thereof, a stockholder, proceeding to impeach it and to have the money re-funded, may maintain a suit against both companies. *Salomons v. Laing*, 6 Eng. Railw. Cas. 303.

* 5. In a case where the plaintiffs complained that the directors of the Victoria Park Company, and certain others, proprietors of * shares, had entered into speculating purchases of the property of the company, that a majority of the directors being bankrupts * were not competent to exercise such office, and that the defendants were in various modes squandering the property of the company, and praying for the appointment of a receiver, and an injunction to compel the application of the company's resources to the extinguishment of its liabilities, and for the winding up of the affairs of the company, the Vice-Chancellor held, that upon the facts stated he must presume the existence of a board of direction *de facto*, and the possibility of convening a general meeting of proprietors, capable of controlling the acts of the existing board, and that there therefore appeared no insuperable impediment

to become plaintiffs in the proceeding. There was an agreement in the lease to refer to arbitration all disputes that might arise on the lease. It was held that the agreement not only did not oust the court of its jurisdiction, but that in the circumstances it might even enjoin both roads from making such reference in relation to the amount due to B., and, if such reference had been made, then from proceeding therewith, and that even the fact that the contract was made and to be performed within a foreign jurisdiction would not hinder the court from acting, having jurisdiction of the parties. *March v. Eastern Railroad Co.*, 40 N. H. 548; s. c. 43 N. H. 515. In *Nazro v. Merchants' Mutual Insurance Co.*, 14 Wis. 295, it is laid down that the capital stock of an incorporated company is a trust fund, the proper application of which courts of equity will enforce by virtue of their inherent jurisdiction over trusts and frauds. See *Lead Mining Co. v. Merryweather*, 2 Hemm. & M. 254; s. c. 10 Jur. n. s. 1231. But the suit should in form be in behalf of all the shareholders. *March v. Eastern Railroad Co.*, *supra*; *White v. Carmarthen Railway Co.*, 1 Hemm. & M. 786. But see *Croskey v. Wales Bank*, 4 Gif. 314; s. c. 9 Jur. n. s. 505; *Thomas v. Hobler*, 8 Jur. n. s. 125. An illusory suit really brought in the interest of a rival company was held not maintainable in *Forrest v. Manchester, Sheffield, & Lincolnshire Railway Co.*, 30 Beav. 40; on appeal, 7 Jur. n. s. 887. And see *Burt v. British Nation Life Assurance Ass.*, 4 De G. & J. 158; s. c. 25 Law J. Ch. 731, before the Lord Justices; *Hutton v. Scarborough Cliff Hotel Co.*, 2 Drewry & S. 514.

Where a party had given money to the directors of a corporation in payment of shares, but had subsequently been struck off the list of shareholders at his own request, on the ground that the scope of the company had been enlarged beyond that at first proposed, it was held that he could not maintain a bill for the money either against the directors or the company, there being no fraud alleged; not against the company, because the money in its hands was not impressed with a trust; not against the directors, because the remedy against them was adequate at law. *Stewart v. Austin*, Law Rep. 8 Eq. 299.

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ment in the way of the company obtaining redress in its corporate capacity for the acts complained of; and that therefore the plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation.⁷ In a later case before the * Lord Chancellor, COTTENHAM, the opinion of Vice-Chancellor WIGRAM, in *Foss v. Harbottle*, is fully confirmed, and it was conceded that it makes no difference whether the acts complained of as being transacted by the usurping board of directors were absolutely void and illegal, or merely voidable at the election of the company. The Lord Chancellor said he had called for one case where a court of equity had assumed to try the validity of the election of corporate officers *de facto* exercising certain functions, and this at the suit of individual shareholders, where there appeared no impediment to the corporation seeking redress by mandamus, or any appropriate remedy, and as no such case had been produced, he should assume that none existed, and he would not be the first to make such a case.⁸

⁷ *Foss v. Harbottle*, 2 Hare, 461; *Thames Haven Dock & Railway Co. v. Hall*, 6 Scott, N. R. 342, 350; s. c. 3 Railw. Cas. 441. The latter of these cases was an action for calls, and the question of the existence of the company was attempted to be raised, after the case was set down for trial. It was held too late to raise such questions, and also that the validity of the authority of directors to make calls, as such, could not be raised in this mode; and that after plea, it would be presumed that the attorney bringing the suit was appointed under the seal of the company. See also *Exeter Railway Co. v. Buller*, 5 Railw. Cas. 211, where it is said, that if the directors refuse to comply with a vote of a majority of the shareholders, a court of equity will compel them to do so, by injunction. But the allegation that shares were bought up by interested parties, to change the vote, is nothing which a court of equity will consider. That is what every one may lawfully do, if he do not infringe the terms of the charter. *Mozley v. Alston*, 1 Phillips, 790.

⁸ *Mozley v. Alston*, 1 Phillips, 790; *Lord v. Copper Miners' Co.*, 2 Phillips, 740; *Bailey v. Birkenhead, Lancashire, & Cheshire Junction Railway Co.*, 12 Beav. 433; s. c. 6 Railw. Cas. 256. In this last case it was held, that acts not set forth in the bill, although declared to be public acts, could not be referred to, in an argument on demurrer. It should be borne in mind, that the distinction attempted to be drawn from some of the cases, between void acts of the directors and those which are merely voidable, is important chiefly in determining the discretion of the Chancellor, and is to be viewed in these cases much as in other cases where the authority of agents comes in question. *Hodges Railw.* 71. And in *Hichens v. Congreve*, 4 Sim. 420, where certain persons agreed for the purchase of certain iron and coal mines for £10,000, formed a joint-stock company for working them, and stipulated for the sale of the mines to

* 6. But it seems to be well established, that the directors of a corporation are liable personally each for his own share in any

the company for £25,000, the £15,000 to be divided among the projectors and their friends, who acted as officers of the company, which being acceded to by the company, and the money distributed accordingly, upon a bill brought by *some of the shareholders, on behalf of themselves and the others*, against the persons who had participated in the £15,000, the latter were decreed to refund what they had received, and one of them having become bankrupt after he had paid the amount received by him into court, under an order upon motion, it was considered that the plaintiffs were entitled to receive that sum, and were not to be put to prove their demand under the commission. On the question, who was to receive the benefit of the restitution, the Vice-Chancellor said, "Those who now are, and those who by assignment from the present proprietors may become, members of the company."

Directors to whom the entire management of the company is intrusted, and who receive a remuneration for their services out of the funds of the company, are under an obligation to the shareholders at large to use their *best exertions in all matters which relate to the affairs of the company*. And without any stipulation to that effect, the duty results, *from the employment*, not to make *any profit* out of the employment beyond their compensation, and not to acquire any adverse interest, while they remain directors. *Benson v. Heathorn*, 1 Y. & Col. C. C. 326; *Great Luxembourg Railway Co. v. Magnay*, 25 Beav. 586; s. c. 4 Jur. n. s. 839; *Gaskell v. Chambers*, 5 Jur. n. s. 52; s. c. 26 Beav. 860; *Hodginson v. National Live Stock Insurance Co.*, 26 Beav. 473; s. c. 5 Jur. n. s. 478; s. c. on appeal, 4 De G. & J. 422; 5 Jur. n. s. 969. See also *Robinson v. Smith*, 8 Paige, 222. So, too, a director is liable to account for premiums received on the sale of shares. *York & North Midland Railway Co. v. Hudson*, 16 Beav. 485, 495; s. c. 19 Eng. L. & Eq. 361. It was held in this case, that the directors could not discharge themselves from such a claim by suggesting that the money had been expended for secret purposes connected with the enterprise, and that persons in a fiduciary relation could not retain any remuneration for their services. But on this last point see *Hall v. Vermont & Massachusetts Railroad Co.*, 28 Vt. 401. Where the stock of certain shareholders was about to be sold, and the officers of the company appointed an agent to buy it "for the use of the company," but when purchased they took a portion of it to themselves, it was held that they were liable, in an action at law, to any shareholder, for the damage thereby sustained by him. *Kimmel v. Stoner*, 18 Penn. St. 155; *Attorney-General v. Wilson*, 1 Craig & P. 1. Redress in such cases is to be sought ordinarily, it would seem, in the name of the corporation. *Society of Practical Knowledge v. Abbott*, 2 Beav. 559. But very extensive amendments in the frame of the bill, and even in the names of the parties, will be allowed. *Jones v. Rose*, 4 Hare, 52; *Fellowes v. Deere*, 3 Beav. 353; 7 Beav. 545; *Tooker v. Oakley*, 10 Paige, 288. Where the directors of a corporation pay over the funds in their hands, or in the treasury of the corporation, on a pretended claim, which they must be presumed to know to be wholly unfounded, it is a breach of trust on their part, for which they

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loss occasioned to the company, for malversation, in the exercise of his functions, whether misfeasance, malfeasance, or non-feasance, the same as any other trustee, and redress may ordinarily be obtained in equity.⁸ And it seems in such cases, as each director is liable only for his own act and those to which he has assented, and there is no contribution among wrongdoers, there is no necessity that all the board should be parties to the bill, and * although strictly the proceeding should be instituted in the name of the company, many exceptions are allowed in this respect, as where the loss falls exclusively upon a portion of the shareholders, and where the majority are proceeding in violation of the fundamental law of such companies.⁹

7. And where the managing committee employed the funds of the company in buying up the shares in the market, it was held that the members of the committee were not properly charged with these sums in winding up the concern.¹⁰ But the Vice-Chancellor said he entertained no doubt of its being a breach of trust, and that the parties, and all the parties, aiding or counsel-

are personally responsible, and one stockholder can maintain an action against them therefor, suing in his own name and in behalf of the other stockholders. *Butts v. Wood*, 38 Barb. 381. And see, as to the duties of directors and the degree of care required of them, *Richards v. New Hampshire Insurance Co.*, 43 N. H. 263.

Officers of a corporation cannot purchase any claim against or interest in the company, except in trust for the company, after a resolution has been adopted by them, as managers, directing one of their number to purchase for the benefit of the company. A change of time and place from that published for the sale, where a resolution was passed directing the manager to purchase stock for the benefit of the company, is no revocation of the authority. In an action for conspiracy, proof of a division of the profits of the fraudulent concern is sufficient evidence of combination in the first instance to render the declarations of one conspirator admissible in evidence against the rest. *Ib.*

⁸ *Preston v. Grand Collier Dock Co.*, 2 Railw. Cas. 335; s. c. 11 Sim. 327; *Walworth v. Holt*, 4 Myl. & C. 619. Each shareholder has a distinct interest in dividends declared on stock, which cannot be represented by other shareholders, suing on behalf of themselves and the rest of the shareholders. *Carlisle v. Southeastern Railroad Co.*, 6 Railw. Cas. 670. See also the opinion of Lord CRANWORTH, V. C., *Beman v. Rafford*, 1 Sim. N. S. 550; s. c. 6 Eng. L. & Eq. 106; *Hodges Railw.* 71.

¹⁰ *In re London & Birmingham Extension Railway Co.*, 5 De G. & S. 402; s. c. 18 Eng. L. & Eq. 201.

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ling it, when properly brought before the master, might be made liable.¹⁰ (c)

8. But a court of equity will not entertain a bill to compel a railway company to apply funds raised by the issue of new stock, according to the resolution by which the new stock was created by the directors of the company.¹¹

9. It is a settled rule of equity law, that the minority of the shareholders in a joint-stock corporation may maintain a suit to restrain the directors of the company, or the majority of the shareholders, from entering into a stipulation whereby the business of the company is changed and directed into channels and enterprises wholly diverse from those originally contemplated and entered upon, and from which their emoluments have been derived.¹² (d) But the court will not interfere to enjoin the

¹¹ *Yetta v. Norfolk Railway Co.*, 5 Railw. Cas. 478; 3 De G. & S. 293; 18 Jur. 249.

¹² *Kean v. Johnson*, 1 Stock. 401; *supra*, § 20; *March v. Eastern Railroad Co.*, 40 N. H. 548; s. c. 43 N. H. 515; *Nazro v. Merchants' Mutual Insurance Co.*, 14 Wis. 295. In the last case the question was affected by an act of the legislature authorizing the proposed change, and the decision turned in part upon the construction to be given to this act. And see *Dyckman v. Valiente*, 43 Barb. 131. And in *State v. Bailey*, 16 Ind. 46, it was held, that, where corporations are consolidated, with the consent of the legislature, those stockholders in the old who do not join the new are entitled to withdraw their shares, and may have an injunction against the company until they are secured. See *Port Clinton Railroad Co. v. Cleveland & Toledo Railroad Co.*, 13 Ohio St. 544. The rule of the text is applied to a church congregation in *Winebrenner v. Colder*, 43 Penn. St. 244. See *German Evangelical Congregation v. Pressler*, 14 La. An. 799. *Charlton v. Newcastle-upon-Tyne Junction Railway Co.*, 5 Jur. n. s. 1096; *Knabe v. Ternot*, 16 La. An. 13. But a minority of stockholders cannot restrain the company from doing what is plainly within the scope of their powers, on the ground that it will probably hinder the attainment of one of the objects of the company. *Syers v. Brighton Brewery Co.*, 13 W. R. 220. And the plaintiff must be acting in good faith,

(c) Nor can a director purchase bonds of the company below par. *Duncomb v. New York, Housatonic, & Northern Railroad Co.*, 84 N. Y. 190.

(d) A suit to restrain a corporation from a transaction which is *ultra vires* may be maintained by a single stockholder, though all the rest assent; but

where there is evident expediency, and no attempt to go beyond the corporate powers, a court of equity will not be swift to issue a preliminary injunction to a single stockholder, who assails transactions to which all the others assent. *Dupont v. Northern Pacific Railroad Co.*, 18 Fed. Rep. 467.

majority * of the shareholders from applying surplus funds in the hands of the corporation to an extension of the business within

not merely as a puppet in the hands of others. *Filder v. London, Brighton, & South Coast Railroad Co.*, 1 Hemm. & M. 489; *Forrest v. Manchester, Sheffield, & Lincolnshire Railway Co.*, 30 Beav. 40; s. c. 7 Jur. n. s. 887.

But where the plaintiff, having lost money in speculating in the stocks of the company, bought five shares for the purpose of instituting a suit, in order to be bought off, it was held no ground for an application to the court for summarily striking the suit off the files of the court. *Seaton v. Grant*, Law Rep., 2 Ch. Ap. 459.

In *In re Phoenix Life Insurance Co.*, 9 Jur. n. s. 15, an extension of the business of a life-insurance company to marine insurances, made by a resolution of a specially convened meeting, and specified in a deed executed by some of the shareholders, and carried on without objection for a year and a half, was held not to bind the general body of the shareholders. But see *In re Saxon Life Assurance Co.* 1 De G. J. & S. 29. See also *Maunsell v. Midland Great Western Railway Co.*, 1 Hemm. & M. 130; s. c. 9 Jur. n. s. 660; *Hattersley v. Shelburne*, 7 Law T. n. s. 650; *Great Western Railway Co. v. Metropolitan Railway Co.*, 9 Jur. n. s. 562; s. c. 32 Law J. Ch. 382. In the last mentioned case, the Great Western Railway Co. was authorized by act of Parliament to hold 17,500 shares in the Metropolitan Railroad Co. On an extension of the Metropolitan railway, additional shares were to be offered to the original shareholders, and the Great Western Company claimed its proportion of additional shares. It was held by Wood, V. C., that the company was not authorized to take, and could not claim any additional shares; by the court of appeal, that it might be authorized to take, though not to hold, the additional shares, and leave to amend was given, as the bill did not show which it wished to do. *Ib.* And see *Forrest v. Manchester, Sheffield, & Lincolnshire Railway Co.*, 30 Beav. 40; s. c. on Appeal, 7 Jur. n. s. 887; *Attorney-General v. Great Northern Railway Co.*, 1 Drewry & S. 154; *South Wales Railway Co. v. Redmond*, 9 W. R. 806; s. c. 4 Law T. n. s. 619; *Hare v. London & North-western Railway Co.*, 1 Johns. & H. 252; *Sturges v. Knapp*, 31 Vt. 1. In this case, those having the control of railways in Vermont were enabled by statute to lease them to companies owning other roads connecting with them at the line of the state. A railway having in this manner been leased to the Troy & Boston Railroad Co., it was held that the want of authority in that company to take the lease could not be objected to as long as the state of New York and those interested in that company had taken no measures to interfere with or avoid the lease.

There is an English case bearing on questions discussed in this note. A company having a line built and at work began an extension line, the capital to be raised as portions of the general capital by the creation of new shares, the holders of which were not to have more than six per cent for the first three years. The directors charged to capital one-half of the office expenses, and interest on the debentures for the extension-line, and made a dividend to the extension shareholders from interest paid by the contractors in respect of the

its powers, * because a minority dissent from such extension.¹³ So also the court will not enjoin the majority of the shareholders from extending the business of the corporation to kindred enterprises, beyond those contemplated in the charter, but sanctioned by express legislative grant and the vote of a majority of the shareholders.¹⁴

10. And because no individual stockholder can maintain any action against the directors for defrauding the company, as the directors are liable at law only to the company for any misconduct, equity will interfere at the suit of any stockholder, and sustain a bill at his suit against the directors for misconduct in office, where the corporation is unable to bring a suit at law, or where, through collusion or fraud, it neglects to seek redress, and an application has been made to the directors for the use of the corporate name in the suit and that has been denied.¹⁵ (e)

same being unfinished. A dividend was declared on the old stock on this basis. An interlocutory injunction was granted by Wood, V. C., on the application of one who had bought extension-stock for the purpose of filing his bill, on the ground that the above charges were wrong. On appeal, Lord Chancellor CHELMSFORD continued the injunction until the final hearing, on the ground that the questions were of importance and doubt, and that if the dividend were paid it could not be recovered, which would be an irreparable injury to the extension stockholders. But as the balance carried over to the next year on the revenue account was much larger than the charge for expenses if it was wrong, it was no ground for the injunction. *Semble*, that if the extension-line had been a separate undertaking, not as yet yielding income, the interest of a debt incurred to construct should have been charged on the capital; but it being part of a general undertaking, yielding profit as a whole, *quære*, whether such debt should have been charged to capital. The dividend to extension shareholders was right; unless, as charged in the bill, the interest money was to be refunded to the contractors by the company. If the directors were acting *ultra vires*, it could not be set up that these were matters of internal management which the court would not disturb. The plaintiff having a real interest and his stock being *bona fide* his own, he could maintain the bill in spite of the mode of his introduction into the company; so also in spite of these charges having been acquiesced in by former holders of the stock purchased by him. *Bloxam v. Metropolitan Railway Co.*, Law Rep. 3 Ch. Ap. 387.

¹³ *Pratt v. Pratt*, 33 Conn. 446.

¹⁴ *Durfee v. Old Colony & Fall River Railroad Co.*, 5 Allen, 230.

¹⁵ *Allen v. Curtis*, 28 Conn. 456. But the action must be brought without unreasonable delay, or the parties thus affected will lose their right to object to the irregularity. *Peabody v. Flint*, 6 Allen, 52.

(e) See *supra*, note (d).

* 11. Such a bill should be brought on behalf of the plaintiff and all other stockholders who elect to come in under the proceeding, and should make the corporation a party as well as the directors, and should allege the refusal of the corporation to proceed against the directors.¹⁵

12. The directors of a railway company are not responsible personally for property purchased on the credit of the company, or in its name and behalf, on the ground that it was purchased by them when the company had no available means to pay for it.¹⁶

13. It is the implied law of the association, that the business shall continue to the limit of the time fixed by the charter, if it prove remunerative, and "it is the right of a partner to hold his associates to the specified purposes while the partnership continues."¹²

14. And where the directors of a bank refused to take the proper measures to resist the collection of a tax which they themselves believed to have been imposed upon them in violation of their charter, this refusal amounts to what is termed in law a breach of trust, and a stockholder may maintain a bill in equity against them, asking for such remedy as the case might require.¹⁷

15. And it would seem that the company might expend their funds, to a reasonable amount, in resisting proceedings in parliament the tendency of which will be to injure the company.¹⁸

16. But a court of equity will not compel the directors of a corporation to declare dividends out of the surplus earnings of the company, unless they are shown to have refused from a wilful abuse of their discretion.¹⁹

17. The directors are only liable for good faith and reasonable diligence.¹⁹

¹⁵ *Rochester v. Barnes*, 26 Barb. 657.

¹⁷ *Dodge v. Woolsey*, 18 How. 331.

¹⁸ *Bright v. North*, 2 Phillips, 216, before Lord Chancellor COTTENHAM. This was the case of the conservators of river banks, whose funds were raised by a rate on the adjacent land-owners, and it is stronger, perhaps, than that of a railway company. The Lord Chancellor seemed to entertain so little doubt of the duty of the commissioners to expend money in opposing any grant in parliament which would injure the works under their care, that he did not call for argument in favor of the exercise of the right.

¹⁹ *Smith v. Prattville Manufacturing Co.*, 29 Ala. 508.

*SECTION VIIL

Applications to Legislature for Enlarged Powers.

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| <p>1. Equity will not restrain railway companies from petitioning for enlarged powers.</p> <p>2. Early English cases favored such applications.</p> | <p>3. At most will merely restrain company from using existing funds for that purpose.</p> <p>4. Applications to legislature on public grounds not to be restrained; <i>aliter</i> those on private grounds.</p> |
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§ 212. 1. In general, perhaps, courts of equity would not feel called upon to restrain the directors and agents of the company from applying to the legislature for an alteration or enlargement of their powers, for this is sometimes indispensable for the accomplishment of the objects of their creation, and very often highly desirable.¹ There are numerous instances in the books² of companies being enjoined from proceeding to build certain works, until they did obtain such an enlargement of their powers. But it is not uncommon for a court of equity to restrain the company from applying their existing funds to such purpose.³ And where the new scheme is in conflict with the interests of other railways, who by leave of the legislature own shares in the company applying for an extension of their line, or an enlargement of their

¹ In *Bill v. Sierra Nevada Lake Water & Mining Co.*, 1 De G. F. & J. 177, it was held that an injunction will not be granted to restrain a corporation from applying for increased powers to the legislature of their own, or, if necessary, of a foreign country. In *Story v. Jersey City Railroad Co.*, 2 N. J. Eq. 18, the court refused to enjoin a railway company from applying to the legislature for enlarged powers, changing fundamentally its object, asking an abridgment of the political rights of the citizen.

² *Frederick v. Coxwell*, 8 Y. & J. 514.

³ *Stevens v. South Devon Railway Co.*, 18 Beav. 48; s. c. 2 Eng. Law & Eq. 138. In this case, and in *Parker v. River Dun Navigation Co.*, 1 De G. & S. 192, the company entered into a stipulation that the objectors should be heard before the parliamentary committee, without which, it is said in the English practice before such committees, where the application is in the name and behalf of the company, objecting shareholders are not heard. Where it was shown that the provisions of a bill would have the effect to reduce the income of a corporation, it was held that the corporation should not be restrained from opposing the bill before a committee of the House of Lords. *Regina v. Dublin*, 9 Law T. N. s. 123.

powers, equity will not restrain them absolutely from procuring the contemplated grant, but only from using their funds for that purpose; and will also prohibit one company from keeping its proceedings secret as to another company owning part of their stock, and will *generally enjoin the act of a majority of a joint-stock company, where the voice of the minority is not properly heard at the meeting, or is agreed to be disregarded by previous concert.⁴

2. The early cases upon this subject before Lord BROUGHAM, as Chancellor, although in some respects more liberal in favor of allowing applications to parliament, seem to be more in accordance with the spirit of enterprise in this country than some of the recent English cases.⁵

3. The most which upon principle can be justified in this direction, is to restrain the company from applying their existing funds either to the obtaining of enlarged powers or to carrying them into effect. But the question of enlarging the powers of the company, or altering its fundamental law, is a matter resting altogether in the discretion of the legislature. And this, if accomplished, will not bind the existing shareholders who have not assented to the alteration, but must be carried into effect by a new subscription probably, and this will subject the corporation to the embarrassment of a double accountability, or the apportionment of loss and profits upon the several portions of the enterprise.⁵

4. In one case of some interest, it was decided that applications to the legislature on public grounds could not be restrained by injunction, while those of a private nature might be so restrained in the discretion of courts of equity.⁶

⁴ *Great Western Railway Co. v. Rushout*, 5 De G. & S. 290; s. c. 10 Eng. L. & Eq. 72. See also *Const v. Harris*, 1 Turn. & R. 496, where Lord ELDON goes into an elaborate consideration of the rights of the minority of joint-stock companies, and what acts of the majority are binding on the company. *Attorney-General v. Norwich*, 9 Eng. L. & Eq. 93; s. c. 21 Law J. Ch. 139.

⁵ *Hare v. Grand Junction Water Works Co.*, 2 Russ. & M. 470. And see *Ward v. Attorney's Society*, 1 Collyer, 370; *Munt v. Shrewsbury & Chester Railway Co.*, 13 Beav. 1; s. c. 3 Eng. L. & Eq. 144. See *Cunliffe v. Manchester & Bolton Canal Co.*, 2 Russ. & M. 480, in note; *supra*, § 56.

⁶ *Lancaster & Carlisle Railway Co. v. Northwestern Railway Co.*, 2 Kay & J. 293.

*SECTION IX.

Specific Performance.

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| 1. Equity may decree specific performance of railway contracts, referring the question of law to the law courts.
2. But where the legal right is clear, equity will not interfere.
3. Nor will it where the proofs are conflicting.
4. Nor will it with a contract of the company to stop at a refreshment station. | 5. Nor if there is doubt of the legality of the contract, or its character.
6. Contract between companies for the use of each other's track may be enforced.
7. So may a contract with a land-owner in regard to farm crossings.
8. Specific performance not decreed where there was a mistake as to import of terms used. |
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§ 213. 1. There can be no doubt courts of equity will, in proper cases, decree specific performance of contracts between different railways, or between natural persons and railway companies. (*a*) But where the legal rights of the parties were doubtful, and no irreparable injury was to be apprehended, an action at law to try the legal question was ordered, and the business of the companies concerned was ordered to go on, the injunction of the Vice-Chancellor being dissolved by the Lord Chancellor for that purpose, and an account of passengers and other traffic upon the railway, in the mean time, ordered to be kept, to enable the Chancellor ultimately to adjust the question of damage according to the decision of the question at law.¹

2. But it was said, in another case,² by the Lord Chancellor, * reversing the decree of the Vice-Chancellor, that the court

¹ *Shrewsbury & Birmingham Railway Co. v. London & Northwestern Railway Co.*, 3 Macn. & G. 70; s. c. 1 Eng. L. & Eq. 122. The question here was, whether the defendants, according to a certain contract claimed to exist between them, were at liberty to do business between certain points. It was claimed, among other things, that the contract was wholly void, as against public policy. *Furness Railway Co. v. Smith*, 1 De G. & S. 299; *supra*, § 142. And see *Munro v. Wivenhoe & Brightlingsea Railway Co.*, 11 Jur. N. S. 612; s. c. 12 Law T. N. S. 655; *Cardiff v. Cardiff Waterworks Co.*, 4 De G. & J. 596; *Imperial Gas Light & Coke Co. v. Broadbent*, 7 H. L. Cas. 600.

² *Playfair v. Birmingham, Bristol, & Thames Junction Railway Co.*, 1 Railw. Cas. 640. Courts of equity will not decree specific performance of

(*a*) For specific performance of contracts for the purchase of tracts for the sale of shares, see *supra*, § 88; of contracts for the purchase of lands, see *supra*, § 62.

[*338, *339]

cannot upon an alleged equity interfere with an admitted legal right, unless there be a manifest certainty that at the hearing of the cause the plaintiff will be entitled to relief: that the title to relief in this case was not so clear as to justify the court in continuing the injunction, except upon the terms of the plaintiff giving judgment in the action and paying the amount sued for into court.

8. And in a case where the time for taking land under the company's act had expired, they having purchased land of A. and of B., and being about to enter upon the land to which they supposed they had purchased the title of B., A. claimed a life-estate in the same, and brought this bill to restrain the company from proceeding to appropriate it, the affidavits being conflicting, the court refused to interfere by injunction, but left the plaintiff to his remedy at law.³

4. So, too, the court refused to grant an injunction requiring the company to stop their train at a refreshment station, as the plaintiff claimed they had agreed to do, the company undertaking to pay such a sum of money as might be assessed as damages for the violation of the covenant, to be ascertained by the court.⁴ (b)

the contract of directors of a railway company, which is grossly improvident. 29 Law T. 186. Where a contract contains an express negative covenant, and complete justice can be done between the parties, the court will grant an injunction to prevent a breach of the negative covenant; but the court rarely interferes where there is no express negative stipulation, but the negative obligation is only to be inferred from a positive contract. *Peto v. Brighton, Uckfield, & Tunbridge Wells Railway Co.*, 1 Hemm. & M. 468; s. c. 32 Law J. Ch. 677.

³ *Webster v. Southeastern Railway Co.*, 1 Sim. n. s. 272; s. c. 6 Railw. Cas. 698.

⁴ *Rigby v. Great Western Railway Co.*, 1 Cooper Pract. Cas. 6; s. c. 4 Railw. Cas. 491. In this case, 4 Railw. Cas. 190, it was held to be unnecessary to aver, that the trains passing the station in violation of the covenant contained passengers desirous of having refreshment, and who gave notice thereof. ALDERSON, B., said: "I think the meaning of the covenant is, that the parties have undertaken to stop the trains in order to the temptation, so to

(b) A clause in a deed to a railway company providing for the erection of a depot, on the land, the stopping of trains, the regular taking of freight and passengers there, &c., will not be specifically enforced. It is not a covenant, but a condition subsequent. *Blanchard v. Detroit, Lansing, & Lake Michigan Railroad Co.*, 31 Mich. 43. And were it a covenant it should be specific as to location, plan, size, shape, &c. *Ib.*

5. But where any doubt arises in regard to the legality of a contract, or if it be not of a class where specific performance is usually decreed, the court will not interfere by injunction.⁵

speak, to the passengers to take refreshment." 14 M. & W. 811. The covenant in this case contained an exception of trains "sent by express, or for especial purposes," and this was held not to include what are properly called "express trains." *Hodges Railw.* 64. But in *Sevin v. Deslandes*, 7 Jur. x. s. 837, an injunction was granted to restrain an owner of a vessel from doing any act inconsistent with a charter-party into which he had entered. See *De Mattos v. Gibson*, 4 De G. & J. 276. And in *Hood v. Northeastern Railway Co.*, Law Rep. 8 Eq. 666, the court enforced the contract of a railway company with a land-owner, that a "portion of the land taken should be forever thereafter used for a first-class station," &c., which the court construed to mean, for the stopping of all trains "other than mail, express, and special trains." So also the courts of equity will enforce a contract with the land-owner to build and maintain alongside his land, and for his use and convenience, a siding of a prescribed extent. *Greene v. West Cheshire Railroad Co.*, Law Rep. 13 Eq. 44. And where the statute prohibits the company from abandoning any depot or station on its road, after it has been established for twelve months, except by approval of the railway commissioners on hearing and due notice, it was held to apply to stations established by the lessors of the road, after the termination of the lease and the restoration of the road to the lessors. It was also held, that a mere platform and temporary shelter, where passengers were taken up and set down, amounted to such station, and that its continuance would be enforced by mandamus. *State v. New Haven & Northampton Co.*, 37 Conn. 153.

⁵ *Johnson v. Shrewsbury & Birmingham Railway Co.*, 3 De G. M. & G. 914; a. c. 19 Eng. L. & Eq. 584. This is the case of a railway leasing its line and furniture to plaintiffs. The bill prayed an injunction against the railway determining the contract, contrary to what they claimed to be its true construction. The court said, that by the working of the line by other parties than the company, the public lost the benefit of the guaranty thereby afforded for care and attention. Such an agreement would seem to be illegal, as contrary to public policy. But if legal, the plaintiffs had ample remedy at law. *Foster v. Birmingham & Dudley Railway Co.*, W. R. 378; *Hodges Railw.* 680. In *Port Clinton Railroad Co. v. Cleveland & Toledo Railroad Co.*, 18 Ohio St. 544, it was held, that if the court could in any case decree specific performance of a contract to operate a railway, requiring as it would personal acts and involving the exercise of skill and judgment under varying circumstances and emergencies, it could only be in a case where the demand for the exercise of the power was stringent, and the circumstances such as to authorize the court in making the order to limit the duration as to time, and to define, to some reasonable and proper extent, the manner in which it should be obeyed. Courts of equity will never decree specific performance where the party has not the power to perform the decree, but will leave the party to his remedy at law. *Ellis v. Colman*, 25 Beav. 662.

* 6. A contract between two railways, that each shall run upon a portion of the other's line, is of a permanent character, and cannot be determined without the consent of both parties, although in terms it do not specify "successors," and if the line of one of the companies is leased to a third company, a court of equity will restrain the other party from interfering with the use of the line granted to the third company, or its lessees. A contract for such an easement need not be by deed.⁶

7. Courts of equity will decree specific performance of contracts by a railway company with a land-owner, in regard to farm-crossings and such like works, upon the lands of the company, in which such party has an interest so material that the non-performance cannot be adequately compensated at law.⁷

8. Courts of equity will not decree specific performance of any contract where there has been a mistake of one or both the parties in regard to the import of the terms used in the contract. Nor will it reform a contract on the ground of mistake, unless it clearly appear that both parties were agreed in the terms, but the contract was so drawn as to express the mind of neither. But a court of equity will sometimes set aside and annul a contract on the ground of the innocent mistake of one party. But it must appear the plaintiff has not been in fault, and that no injustice will be done the other party.⁸ Hence the subscriber to the stock of a railway can have no relief in a court of equity, on the ground that while intending merely to renew an old subscription to the stock, which had fallen through, he by some unaccountable mistake subscribed for double the amount, but, although knowing his mistake at once, he gave the company no notice, and suffered them to act upon the faith of the subscription during several months.⁹

⁶ *Great Northern Railway Co. v. Manchester, Sheffield, & Lincolnshire Railway Co.*, 5 De G. & S. 138; s. c. 10 Eng. L. & Eq. 11. But equity will not lend its aid, where the parties have put an end to the contract. *Androscoggin & Kennebec Railway Co. v. Androscoggin Railway Co.*, 52 Me. 417.

⁷ *Storer v. Great Western Railway Co.*, 2 Y. & Col. C. C. 180; s. c. 3 Railw. Cas. 106. A contract by a railway company to construct a highway, in consideration that the promisees will procure the waiver by the admiralty of the construction of certain works required by the company's act, will be enforced in equity. *Wilson v. Furness Railway Co.*, Law Rep. 9 Eq. 28. *Supra*, § 39.

⁸ *Diman v. Providence, Warren, & Bristol Railroad Co.*, 5 R. I. 130. A corporation must be described in a bill in equity as one established by law in [*340, *341]

SECTION X.

Injunctions restraining Company from interfering with Exclusive Franchises of another.

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| <p>1. 6. Equity exercises a preventive jurisdiction to prevent infringement of franchises.</p> <p>2. Will not interfere where the legal right is doubtful.</p> <p>3. Unless to prevent irreparable injury, multiplicity of suits, or where legal remedy is inadequate.</p> <p>4. Statement of facts and mode of procedure in such cases.</p> | <p>5. Injunction to prevent the connection of different lines so as to create competing line.</p> <p>7. Railway not regarded as an infringement of the rights of a canal.</p> <p>8. But will be restrained from filling up the canal.</p> <p>9. Rights of railway companies, if allowed to become proprietors of canals.</p> |
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§ 214. 1. The subject of the exclusive franchises of corporations will be considered elsewhere. But equity exercises a jurisdiction of a preventive character, by way of injunction, in regard to alleged infringements of such franchises, which is of a very important character. The general grounds of such interference are clearly and fully stated by Vice-Chancellor WIGRAM, in the case of *Cory v. The Yarmouth & Norwich Railway*.¹ (a)

some state, and doing business at some place. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

¹ 3 Railw. Cas. 524; s. c. 3 Hare, 593. Here the plaintiff, owning a ferry, obtained an act of Parliament allowing him to build a bridge, and enacting that any person who should evade the tolls by conveying passengers, &c., over the river otherwise than by the bridge, should subject themselves to a penalty of 40s. for each offence, to be recovered in a summary way before a justice of the peace. The defendants purchased of the plaintiff a piece of land for a terminus, within the limits of the ferry, and a clause was inserted in defendant's act, that they would not erect a bridge over the river without the plaintiff's consent, and that nothing therein contained should prejudice or affect the right of the plaintiff to the ferry, or bridge, or to the tolls. The railway company dug a canal to the river, and by means of a steamboat conveyed its passengers from its terminus to a point in Yarmouth on the opposite shore, much below the plaintiff's bridge. The form for an order for a trial at law, in such cases, will be found in the report of this case.

(a) A temporary injunction was refused to restrain a company from laying track on an abandoned road-bed, parallel to the road of the plaintiffs, three miles distant, the plaintiffs having obtained title before the abandonment, seventeen years before, and the defendant having just acquired

* 2. It is considered that this interference is solely in aid of the legal right,—that if the legal right is free from doubt equity may assume to decide it, or to act definitely upon its acknowledged existence. If it is considered conjectural and altogether problematical, equity ordinarily will not interfere until the legal right is established by the judgment of the appropriate legal tribunal.

3. But in their discretion courts of equity will interfere by injunction, during the pendency of the trial at law, to prevent irreparable injury, to avoid multiplicity of suits, and in some cases, where there is given no adequate legal redress.² But where the injury is small and readily susceptible of estimation, equity will not generally interfere to the prejudice of the trial at law.

4. But in this case, where the only remedy given by the act was by recovering penalties *de die in diem*, in a summary way before a justice, which would not settle the right, the court directed an issue to be tried at law to settle the rights of the parties, suggesting the outlines of the issue, the master to direct the details of the trial, and in the mean time directed the defendants to keep an account of all passengers and carriages, and all other things conveyed by them, and in respect of which the plaintiff would be entitled to any payment or toll if the same had passed over his bridge, and to furnish a copy of such account to the plaintiff before the trial if requested.³

5. In a very elaborate case,⁴ this subject is discussed very much at length by an experienced and learned judge, and the conclusion arrived at, that the plaintiffs' charter expressly providing that no other railway should be authorized by the legislature

² See *Hepburn v. Lesdan*, 2 Hemm. & M. 345; s. c. on appeal, 11 Jur. N. S. 254.

³ *Cory v. Yarmouth & Norwich Railway Co.*, 3 Hare, 593.

⁴ *Boston & Lowell Railroad Co. v. Salem & Lowell Railroad Co.*, 2 Gray, 1. See 2 Redf. Am. Railw. Cas. 577, where the opinion of the court on the constitutional question is given.

the rights of adjoining proprietors. the latter has not reached it and probably will not reach it for a long time, and where no irreparable injury will be done. *Western North Carolina Railroad Co. v. Georgia & North Carolina Railroad Co.*, 88 N. C. 79.

within thirty years, leading from Boston, Charlestown, or Cambridge to Lowell, or to any point within five miles of the northern terminus of plaintiffs' road, it was not competent for the defendant companies so to connect their roads as to make a continuous line from Boston to Lowell, by Salem and Lawrence, even if it were conceded * that the legislature might by express grant have created a rival road from Boston to Lowell, infringing the terms of the plaintiffs' grant. And inasmuch as the defendants had so conducted their business as virtually to create a rival line from Boston to Lowell, in contravention of the express terms of the plaintiffs' grant, without the express permission of the legislature, it did constitute such an infringement of plaintiffs' charter as to be a nuisance to their rights, for which they are entitled to a remedy. And the court accordingly granted a perpetual injunction against the infringement of plaintiffs' rights in the manner complained of.

6. There are many other cases, taking substantially the same view of the propriety of equitable interference to protect corporations against infringements of their corporate franchises.⁶

⁶ *Newburgh & Cohecton Turnpike Road v. Miller*, 5 Johns. Ch. 101, 111; *Ogden v. Gibbons*, 4 Johns. Ch. 150; *Croton Turnpike Co. v. Ryder*, 1 Johns. Ch. 611. A railway bridge is an interference with the charter franchise of a toll-bridge for a turnpike or highway. *Enfield Toll-bridge Co. v. Hartford & New Haven Railroad Co.*, 17 Conn. 40. And in s. c. 17 Conn. 454, it is considered, that the condition in the plaintiffs' charter, that no person shall erect another bridge within the limits of Enfield and Windsor, is a part of its franchise, and not a distinct covenant. But where the charter of the toll-bridge contained no exclusive grant and no limitation in regard to the power of future legislatures to erect other similar bridges, it was held they had no exclusive franchise, and that an injunction would not be granted against another company, chartered by the legislature, within such distance as to lessen the tolls of the first company. *Mohawk Bridge Co. v. Utica & Schenectady Railroad Co.*, 6 Paige, 554. And in *Bridge Proprietors v. Hoboken Co.*, 1 Wal. 116, the national tribunal of last resort held, that even where the charter of a toll-bridge does contain such exclusive grant, a railway bridge, adapted only for railway communication, is not an infringement of such grant. *Infra*, § 231. This was the case of a railway, indeed, which is not so obviously an evasion of the rights and interests of the toll-bridge company as a company precisely similar, but even that is no infringement, unless the charter of the first company contained an exclusive grant. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Dyer v. Tuscaloosa Bridge Co.*, 2 Porter, 296. See also *Thompson v. New York & Harlem Railroad Co.*, 3 Sandf. Ch. 625; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547.

7. And it has been held, that a grant to a canal company to collect tolls for transportation, with an express stipulation against their being reduced by the act of the legislature, is not impaired by the grant of a railway along the same route, with power to take the lands of the canal for its construction when necessary.⁶

8. An injunction was granted, at the suit of the state, to restrain * a railway company from filling up a part of the state canal, and erecting an arch over it, which would obstruct its use, although it appeared that this portion of the canal had been in a state of abandonment for many years.⁷

9. But where a railway company, by act of the legislature, are allowed to purchase a canal, and are bound to maintain and keep it open for traffic, and are to exercise all the rights, powers, and privileges which the canal company might have done before the sale, it was held that the railway company might take the lease of another canal, under the general statute.⁸ It is doubtful whether, if such act were *ultra vires*, the nominee of another company could bring a bill to restrain the act.⁹

⁶ Illinois & Michigan Canal v. Chicago & Rock Island Railroad Co., 14 Ill. 314.

⁷ Commonwealth v. Pittsburgh & Connellsville Railroad Co., 24 Penn. St. 159.

⁸ Statute 8 & 9 Vict. c. 42. Rogers v. Oxford, Worcester, & Wolverhampton Railway Co., 2 De G. & J. Ch. 662.

⁹ Rogers v. Oxford & Worcester & Wolverhampton Railway Co., *supra*. The bill in this case was brought by the clerk of a rival canal company, on a purchase of a few shares of stock to enable him to maintain the bill in his own name and in behalf of the other stockholders, but in fact for the benefit of the rival company. This is a not uncommon shift, in controversies of this character, and it is a disgraceful evasion, which a court of equity ought not to countenance. If the stockholders of the company acquiesce, mere intermeddlers ought not to be allowed to interfere. This is the opinion frequently intimated in the English courts, and it is the only ground of doubt in regard to the case of Stevens v. Rutland & Burlington Railroad Co., 1 Am. Law Reg. 154; *supra*. § 56.

SECTION XL

Injunctions against the Infringement of Corporate Franchises in the Nature of Nuisance.

1-4. Injunction granted to prevent multiplicity of suits, collisions, riots, &c.

5. Court will sometimes enjoin a mere trespass, where the damage is irreparable and without color of right.

§ 215. 1. The cases coming under the general denomination of injunctions to restrain nuisances to corporate franchises, are very numerous and various, too much so, by far, to be here enumerated. It is a branch of equity jurisdiction of ancient date, and which in modern times has been very extensively resorted to by the * equity courts, in order to prevent irreparable damage in various modes, as by multiplicity of suits, by collisions in the nature of riots among the numerous champions of rival public enterprises, and for many other reasons recommending this mode of redress especially to public favor.¹

2. The grounds of equitable interference, in case of nuisance, are well stated by Lord BROUGHAM, in the *Earl of Ripon v. Hobart*:² “If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial, and will, according to the circumstances, direct an issue, or allow an action, and if need be expedite the proceedings, the injunction being in the mean time continued.” But, says his lordship in substance, where the thing in question is only liable to prove a nuisance, according to circumstances, the court will not interfere until the matter has been tried at law. And the same general doctrine is maintained in other cases upon this subject.³

¹ *Attorney-General v. Sheffield Gas Co.*, 3 De G. M. & G. 304; s. c. 19 Eng. L. & Eq. 639. This is a case where the injunction is denied on the ground of the trivial character of the nuisance or damage, but the general grounds of the jurisdiction of courts of equity in such cases are fully and ably discussed by Lord Justices TURNER and KNIGHT BRUCE. See also the opinion of Lord ELDON, in *Attorney-General v. Nichol*, 16 Ves. 338, on the same general subject. The court will not interfere by injunction to prevent a nuisance caused by carrying on a trade which is temporary and occasional only. *Swaine v. Great Northern Railway Co.*, 10 Jur. n. s. 191.

² 8 Myl. & K. 169.

³ *North Union Railway Co. v. Bolton & Preston Railway Co.*, 3 Railw. Cas. 345; *Semple v. London & Brighton Railway Co.*, 9 Sim. 209; s. c. 1 Railw. Cas. 120.

3. In the case of *Boston & Lowell Railway v. Salem & Lowell Railway et al.*,⁴ Chief Justice SHAW thus lays down the law upon the subject: "An injunction will generally be granted to secure a statute privilege, of which a party is in actual possession, unless the right be doubtful."⁴

4. The equitable interference by injunction goes upon the ground that the defendant's acts constitute a nuisance, and that the plaintiff sustains special damage thereby, and that the law affords no specific and adequate remedy. Hence it is not competent for one who suffers damage in common with others only, to maintain * a bill to enjoin a party from the continuance of a public nuisance, under color of legislative grant.⁵

5. And the court will enjoin one railway from placing an obstruction partly in the highway, and partly on the land of another railway, so as to obstruct the passage to the station of the latter company; the injury being conceded to be in its nature irreparable and done without color of title.⁶

SECTION XII.

Injunctions to preserve Property pendente lite.

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| 1. Injunction refused to prevent company from making contract in violation of prior one. | 2. Where injunction might operate harshly, parties put under terms. |
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§ 216. 1. There are some cases where courts of equity have interfered, by injunction, in controversies between different railways, to preserve the property pending the litigation. But in a case where one railway company had leased its line and furniture to another company, and this company proposed to disregard the contract on the ground of its illegality, and were about entering

⁴ 2 Gray, 1. See also on this point, *supra*, § 214, note 5; *Livingston v. Van Ingen*, 9 Johns. 507; *Ogden v. Gibbons*, 4 Johns. Ch. 174; *Osborn v. United States Bank*, 9 Wheat. 738, 841.

⁵ *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *O'Brien v. Norwich & Worcester Railroad Co.*, 17 Conn. 372; *Delaware & Maryland Railroad Co. v. Stump*, 8 Gill & J. 479.

⁶ *London & Northwestern Railway Co. v. Lancashire & Yorkshire Railway Co.*, Law Rep. 4 Eq. 174.

into an arrangement with another company, which would be in violation of the first contract, the court declined to interfere by injunction, as it was not clear that the first contract was valid, or that the loss to the second company, in not entering into their proposed arrangement with the third company, might not be greater than their loss from violating the first contract.¹

* 2. In the English equity practice, in some cases, in consideration of the consequent delay and inconvenience resulting from injunctions, the courts have put the parties under terms to obey the orders of court, and in default of complying with such orders, the injunction to issue. This is done so as to effect substantial justice to one party, without imposing unnecessary hardship upon the other.²

¹ *Shrewsbury & Chester Railway Co. v. Shrewsbury & Birmingham Railway Co.*, 4 Eng. L. & Eq. 171; s. c. 1 Sim. N. S. 410. See also *Spiller v. Spiller*, 3 Swanst. 556; *Great Western Railway Co. v. Birmingham & Oxford Junction Railway Co.*, 2 Phillips, 597; *Farrow v. Vansittart*, 1 Railw. Cas. 602. The question in this case was, whether a reservation, in the lease of land, of the minerals, and the right to remove them, implied the right to erect a public railway, and the Lord Chancellor continued the injunction, to preserve the property, during the pendency of the necessary trial at law. But by statute, 15 & 16 Vict. c. 86, § 61, courts of equity are authorized, in cases where they deem a trial at law unnecessary, to determine the question themselves. Under this statute the equity courts often avail themselves, as by Statute 14 & 15 Vict. c. 83, § 8, they are allowed to do, of the assistance of one of the common-law judges. And it is held that the court will still, in a proper case, give leave to the party to bring an action at law. *Hodges Railw.*, 676; *supra*, § 213.

² *Northam Bridge & Road Co. v. London & Southampton Railway Co.*, 11 Sim. 42; s. c. 1 Railw. Cas. 653. This is a case where the plaintiff prayed for an injunction on defendants from crossing their road, except by means of a bridge. The question of right being sent to the Court of Exchequer, and determined in favor of plaintiffs, the Chancellor, on the defendants undertaking to build the bridge with all possible despatch, held, that an injunction ought not to be granted during the time that must necessarily elapse in building the bridge.

See also *Spencer v. London & Brighton Railway Co.*, 1 Railw. Cas. 159; *Jones v. Great Western Railway Co.*, 1 Railw. Cas. 684; *London & Birmingham Railway Co. v. Grand Junction Canal Co.*, 1 Railw. Cas. 224; *Attorney-General v. Eastern Counties Railway Co.*, 7 Jur. 806; s. c. 3 Railw. Cas. 337; *Langford v. Brighton Railway Co.*, 4 Railw. Cas. 69. This was a controversy in regard to the payment of the price of land, which was in dispute between the parties. The bill prayed, that the defendants be restrained from going forward with their works until they shall have paid the amount

SECTION XIII.

Injunctions to restrain Parties from petitioning Legislature.

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| 1. Right asserted, but rarely exercised, by courts of equity.
2. Not sufficient to justify exercise, that | petition is intended to interfere with rights of other parties.
8. Where right is doubtful it may be sent to court of law for determination. |
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§ 217. 1. The jurisdiction of courts of equity to restrain parties from petitioning parliament in fraud of their own contracts, seems to have been assumed to exist in numerous cases, but its exercise is rare and with marked circumspection.¹ In one * case² the Lord Chancellor, COTTENHAM, said: "In a proper case I should not hesitate to exercise the jurisdiction of this court, by injunction, touching proceedings in parliament for a private bill or a bill respecting property, but what would be a proper case for that purpose it may be very difficult to conceive."

2. But it was here distinctly held, that it is not enough to justify such an interference that the object of the application was to interfere with some right or interest of some other party.³ For every act of the legislature which is promoted by private parties, is intended more or less to affect private interests of other parties. As, for instance, a railway very essentially affects the interests of those land-owners through whose lands it passes, and a private interest resulting from ownership of property is as sacred

demanded. The court held, that it would not interfere by injunction to stop the works, if perfect justice could be done by compelling the company to pay for the land, but would order the approximate value to be deposited until the amount could be determined.

¹ *Stockton & Hartlepool Railway Co. v. Leeds & Thirsk Railway Co.*, 2 Phillips, 666. In this case Lord Chancellor COTTENHAM, says: "There is no question whatever about the jurisdiction. This is the case of a petition against the Clarence company obtaining an act enlarging their powers, and authorizing the amalgamation of the four companies, on the ground that, the plaintiffs having come into the arrangement, it was a fraud in them to oppose the act by which it was to be effected." But the court refused the injunction, on the ground that the contract was merely inchoate.

² *Heathcote v. North Staffordshire Railway Co.*, 2 Macn. & G. 100; s. c. 2 Hall & T. 382; 6 Railw. Cas. 358.

³ And the same doctrine is maintained in the later case of *Bill v. Sierra Nevada, Lake Water, & Mining Co.*, 1 De G. F. & J. 177.

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as that which rests upon contract. But no one would suppose that because the company had obtained an act, or even given notice of taking land, that a court of equity would, at the suit of the land-owners, enjoin the company from applying to parliament to be released from their undertaking. This would still leave them liable to the land-owners, the same as before. Such is the substance of the opinion of the learned Chancellor in the case last cited.

3. In a case where the construction of the act of parliament was doubtful, the question was sent to a court of law, the injunction being continued in the mean time, under such modification as to enable the defendants to perform a condition precedent in their contract with land-owners; and it was said that mere inconvenience could not be viewed in the light of injury, and that companies have a right to carry on their railway according to the plan laid down in their act, although a junction contemplated in procuring the act may be frustrated by the abandonment of the line.⁴

*SECTION XIV.

Interference of Courts of Equity in the Sale and Disposition of the effects of Insolvent Companies.

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| 1. Will interfere to save costs and litigation. | 2. All parties interested may come in. |
| | 3. Summary proceeding in some states. |

§ 218. 1. Where there are sundry *fi. fas.* against a railway company which is insolvent, and it is threatened to levy upon and sell the road with its equipments, equity will take jurisdiction, direct a sale for all concerned, and distribute the funds to such as shall show themselves entitled, according to the usual course of the courts of equity in marshalling assets.¹

⁴ *Clarence Railway Co. v. Great North of England, Clarence, & Hartlepool Junction Railway Co.*, 6 Jur. 269; s. c. 2 Railw. Cas. 763. See also *Attorney-General v. Manchester & Leeds Railway Co.*, 1 Railw. Cas. 436.

¹ *Macon & Western Railroad Co. v. Parker*, 9 Ga. 377. A query is here suggested, whether the railway bed and superstructure are liable to the levy of the execution. At all events they cannot be sold in fragments or distinct portions, on an execution.

2. In such a proceeding any one who has a claim upon the fund, but who is not a party to the suit, may become a party by presenting his claim before the master, or under the decree, before it becomes final.¹ But if he neglects to do so, equity will not aid him in setting it aside.¹ Equity will not relieve against a judgment recovered through the negligence of the defendant.²

3. The courts of equity, in some of the states, have interfered in a very summary manner to set aside conveyances to corporations which have forfeited their corporate rights and existence by irregularity or defect in their proceedings. But in general a corporation must be regularly adjudged to have forfeited its corporate existence before any court will enter upon a collateral inquiry into the facts upon which such claim is made.³

*SECTION XV.

Manner of granting and enforcing ex parte Injunctions.

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| 1, 4. <i>Ex parte</i> injunctions especially liable to abuse.
2. Not allowed in important cases except on notice to other party. | 3. Injunction commonly dissolved, on answer denying equity.
5. Party who obtains such injunction, on imperfect state of facts, liable to costs. |
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§ 219. 1. The general mode of obtaining *ex parte* injunctions is sufficiently understood to be by bill, verified by the oath of the party, and accompanying affidavits. This gives very great advantages always to unscrupulous suitors; and in a country where chancery practice is not a distinct department of the profession, so as to create always the highest standard of professional delicacy, and where it is too much the course of public opinion to justify any degree of professional subserviency, to serve the purpose of clients, there are few instruments in the range of legal proceedings more susceptible of irreparable abuse than an *ex parte* injunction out of chancery.

2. Hence in modern times, when they are sought for the purpose of staying the operations of great public enterprises, either

¹ Bruner v. Planters' Bank, 23 Miss. 406.

² Casey v. Cincinnati & Chicago Railroad Co., 5 Clarke, 357.

in construction or operation, it has been more usual not to allow them, except upon notice to the defendant, and on opportunity to produce affidavits in exculpation.¹

3. The injunction is always dissolved upon the defendant's answer, filed gratis,² denying the equity of the bill, unless for * special reasons the court, on affidavits upon both sides, sees fit to order its continuance, either absolutely or upon terms.³

4. The remarks of Lord Chancellor COTTENHAM are fit to be here inserted, perhaps: "A very wholesome rule has been established in this court; that if a party comes for an *ex parte* injunction and misrepresents the facts of the case, he shall not then be permitted to support the injunction by showing another state of circumstances, in which he would be entitled to it; because the jurisdiction of the court in granting *ex parte* injunctions is obviously a very hazardous one, and one which, though often used to preserve property, may be often used to the injury of others; and it is right that a strict hand should be held over those who come with such applications. The objection here taken is not that the facts were not stated, but that the whole law was not stated; that is to say, that the attention of the court could not have been called to certain provisions of the act, which would have presented a different view of the case in the mind of the judge. If fault is to be found with any one, it is, I am afraid, with the court, which is bound to know every clause in every act ever passed, — a degree of knowledge hardly to be hoped for. I never heard the rule car-

¹ See *Delaware & Raritan Canal Co. v. Raritan & Delaware Bay Railroad Co.*, 14 N. J. Eq. 445. The court in this case denied a motion for a temporary injunction, as being a violation of the spirit of the rule which forbids the issuing of an injunction to restrain the construction of a public work, authorized by a law of the state, until after a hearing on a rule to show cause. And in another case in New Jersey, the court say that when public interests or the rights of large classes are involved, an injunction will not be granted except on hearing and notice, and then only when it appears that the injunction will not prejudice any public or *quasi* public interest. *Useful Manufactures Society v. Butler*, 1 Beasley, 498. See also *Attorney-General v. Charles*, 11 W. R. 253.

² *Attorney-General v. Liverpool*, 1 Myl. & C. 171. But where the dispute is not about facts, but is a mere question of legal construction, as the proper interpretation of a grant of mining rights, a simple denial of the equity of the bill will not as of course entitle the defendants to a dissolution of the injunction. *Boston Franklinite Co. v. New Jersey Zinc Co.*, 2 Beasley, 215.

³ *Warburton v. London & Blackwall Railway Co.*, 1 Railw. Cas. 558.

ried to this extent, that the party applying is bound to lay the whole law before the court. I do not find that any misstatement or omission of any important facts was made on the present application; nor am I at all aware, if the whole law of the case, as far as it can be collected from the act of parliament, had been brought under my view, that upon the statement in the affidavit that the defendants were immediately proceeding to act, I should have thought this a case in which it was expedient to permit the defendants to go on until an opportunity was given to have the matter fully heard and discussed. I have nothing to do with any feelings which may be excited in Liverpool on the subject; the court can only look to the question as a matter of property, and as a matter of property this is the most innocent injunction that could possibly be granted, as indeed is proved by the fact that the defendants have waited fourteen days before they applied to dissolve it. They will still have ample time to carry into effect the plan which they have adopted, and which they have adopted from very good motives. Whether *they have a right to carry it into effect it is not now my intention to determine; my object being to let things remain as they are until this important question can be regularly brought on for solemn argument and decision.

“In many cases the court feels that by granting an injunction *ex parte* it may be doing an act of extreme injustice. The party against whom such an injunction is granted may possibly be exposed to very great injury by the order being enforced; but when, as here, the injunction is to prevent an alteration in the state of property, to prevent the corporation seal from being put to securities, until an opportunity is afforded of having the matter fully discussed, it is not in point of property an injunction which can occasion any mischief whatever.”

In another case⁴ the same learned judge puts forth some very pertinent strictures upon the bad taste and bad morals of litigation in courts of equity, upon grounds quite one side of the merits of the real controversy and matter in dispute: “It is very necessary that this court should deal very strictly with companies, and prevent them, with the large powers that are given to them by acts of parliament, from defeating the rights and interests of individuals. But it is the duty of the court to take care that, if individuals avail themselves of any omission of any power on the part

⁴ Bell v. Hull & Selby Railway Co., 1 Railw. Cas. 636.

of the company, this court should not assist those individuals in extorting money from the company. It is the duty of the court in every case to steer clear of these two opposite extremes; and if there should be some omission which may give a party a legal right against a company, the court would leave that individual to his legal means of taking advantage of it."

5. Where an *ex parte* injunction is granted, upon a state of facts not fully disclosing the case, and is subsequently dissolved, upon a further development of the real facts on the part of the defendant, it should generally be done with costs to defendant.⁵ And if the party obtains an *ex parte* injunction upon one state * of facts, which turn out upon trial not to be true, or not to be the fair state of the full case, he cannot fall back upon another state of facts which is established, and which would also entitle him to an injunction. But sometimes in such cases the injunction is discharged without costs.⁶

SECTION XVI.

Right to interfere by Injunction lost by Acquiescence.

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| <p>1. Acquiescence, to extinguish right, must have operated on other party.</p> <p>2. Delay in learning the extent of injury will not estop the party.</p> | <p>3. The term "acquiescence" has been held not always perfectly to express the idea.</p> <p>4. Injunctions against cities and towns, when granted.</p> |
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§ 220. 1. The right to interfere by injunction is one that should always be asserted, on fresh suit, or it will be regarded as voluntarily waived, and lost by acquiescence.¹ But if the acquiescence

⁵ *Illingworth v. Manchester & Leeds Railway Co.*, 2 Railw. Cas. 187. On this point the Chancellor says: "Is the evil which has arisen from the injunction having been made, and the expense of having it discharged, to be attributed to the error of the court, or to the false representation of the case by the plaintiffs? Certainly the latter. The costs were therefore properly given to the defendants." *Semple v. London & Brighton Railway Co.*, 1 Railw. Cas. 480, 493; s. c. 9 Sim. 209.

⁶ *Greenhalgh v. Manchester & Birmingham Railway Co.*, 1 Railw. Cas. 68; s. c. 3 Myl. & C. 784; *Attorney-General v. Liverpool*, 1 Myl. & C. 171, 210.

¹ *Supra*, § 62; *Illingworth v. Manchester & Leeds Railway Co.*, 2 Railw. Cas. 187; *Semple v. London & Birmingham Railway Co.*, 9 Sim. 209; s. c. 1

is explainable upon other grounds than that of waiver of right, and can be clearly seen not to have, in any sense, invited or confirmed the conduct of the other party, it will not conclude the right to interfere in this mode.¹

* 2. Mr. Hodges says upon this subject, not inappropriately altogether, it is to be feared: "To a very considerable extent each case will be governed by its own particular circumstances; and it has been said on this subject, that there are two arguments invariably adduced by public companies. If the plaintiff comes to the court complaining of an injury at the first commencement, it is said that the damage is trifling and the motion is trifling and vexatious; if he waits till it has assumed a graver shape, it is then said that he has acquiesced, and is therefore precluded from complaining."²

Sim. 120; *Greenhalgh v. Manchester & Birmingham Railway Co.*, 3 Myl. & C. 784; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; *Wintle v. Bristol & South Wales Union Railway Co.*, 10 W. R. 210; *Ware v. Regent's Canal Co.*, 3 De G. & J. 212; *Imperial Gas Light & Coke Co. v. Broadbent*, 7 H. L. Cas. 600; *In re Anglo-Californian Gold Mining Co.*, 10 W. R. 309; s. c. 6 Law T. n. s. 340; *Gregory v. Patchett*, 33 Beav. 595; s. c. 10 Jur. n. s. 1118; *Attorney-General v. Manchester & Leeds Railway Co.*, 1 Railw. Cas. 436. A delay of three weeks after information of proposed buildings, without any inquiries about the place proposed, was held to disentitle plaintiffs to an injunction on the ground of obstruction to their light and air. *Johnson v. Wyatt*, 11 W. R. 852. See also *Great Northern Railway Co. v. Lancashire & Yorkshire Railway Co.*, 1 Sm. & G. 81. In *Pentney v. Commissioners*, 13 W. R. 983, it was held that a claim for compensation for an illegal and enjoined act, made in ignorance of its illegality, was no bar to an application for an injunction made as soon as the claimant had learned his rights. And though the plaintiff's acquiescence may have disentitled him to an injunction against the defendant, it does not follow that equity will restrain him from suing for damages at law. *Bankart v. Houghton*, 27 Beav. 425. Where a resolution was passed by the shareholders of a company, authorizing acts to be done which were partly within and partly without the scope of their powers, such acts being capable of being carried out singly, it was held that a shareholder was not bound to apply for an injunction to restrain the company from exceeding their powers until he became aware that an attempt was being made to carry out the illegal portion of the resolution. *Charlton v. Newcastle-upon-Tyne Junction Railway Co.*, 5 Jur. n. s. 1096. A railway company which suffers another company to build a rival road, without protest or resort to injunction, cannot, after such road is completed, have any claim to enjoin its use. *Erie Railway Co. v. Delaware, Lackawanna, & Western Railroad Co.*, 21 N. J. Eq. 283.

² *Great Western Railway Co. v. Oxford, Worcester, & Wolverhampton Railway Co.*, 3 De G. M. & G. 341; s. c. 10 Eng. L. & Eq. 297; *Ffooks v.*

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3. The kind of acquiescence which will conclude a party has been defined by eminent equity judges as being something not well expressed by that term.³ "Now acquiescence is not the term which ought to be used. If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence."

* 4. Where the extension of a railway is a nuisance, it should be enjoined.⁴ To obtain an injunction against the municipal authorities, on the ground of the execution of public ordinances made by them allowing railway companies to occupy the streets by their tracks, it should appear that such acts are about to be executed, and that they will produce an obstruction in the streets, and that the railway company in executing the ordinance act as the agents of the municipal authorities.⁵

London & Southwestern Railway Co., 1 Sm. & G. 142; s. c. 19 Eng. L. & Eq. 7; *Innocent v. North Midland Canal Co.*, 1 Railw. Cas. 250; cases cited, note 1, Am. ed.; *Mott v. Blackwall Railway Co.*, 2 Phillips, 632; *Graham v. Birkenhead Junction Railway Co.*, 2 Macn. & G. 160; *Bankart v. Houghton*, 27 Beav. 425. In the last-mentioned case it was laid down that where the occupier of land has acquiesced in the erection of works on adjoining land, which appear not to be and are not, in fact, injurious, there is no implied acquiescence in the natural extension of those works in the ordinary course of operations.

³ Lord Chancellor COTTENHAM, *Leeds v. Amherst*, 2 Phillips, 117, 123; *Lee v. Porter*, 5 Johns. Ch. 268, 272; *Perine v. Dunn*, 3 Johns. Ch. 508; *Lee v. Munroe*, 7 Cranch, 366; opinion of COALTER, J., in *Taylor v. Cole*, 4 Munf. 351. In *Hentz v. Long Island Railway Co.*, 13 Barb. 647, where one whose land had been taken by a railway company, neglected to assert his right to compensation until after the road was completed and in full operation, when an interruption of its business would be seriously injurious, it was held that an injunction should not be granted until all the ordinary means for obtaining an indemnity had failed,

⁴ *People v. Third Avenue Railroad Co.*, 45 Barb. 63.

⁵ *People v. New York & Harlem Railroad Co.*, 45 Barb. 73.

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SECTION XVII.

Mandatory Injunctions sometimes allowed.

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| <ol style="list-style-type: none"> 1. Injunction may have a mandatory effect, but it must be specific. 2. Decree for specific performance is a mandatory injunction. 3. Injunction not granted to transfer litigation to another forum. | <ol style="list-style-type: none"> 4. Mandatory injunction granted only where serious injury would otherwise ensue. 5. Fact that the act is done, no ground for refusing injunction. |
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§ 221. 1. It has been held, that it is no objection to an injunction that it was in effect of a mandatory character.¹ But all injunctions should be specific and intelligible; and it is well said in regard to an injunction restraining the company from taking and using any more of the plaintiff's land than is necessary for the purpose of making and maintaining the railway and works authorized by the act, by Lord Chancellor COTTENHAM: "I do not believe the Vice-Chancellor intended that the injunction should be in this form, when he decided the question; and this appears to be a very objectional form of order. It is there held, that the injunction should be so expressed as to *inform the defendant of the precise limits of his right, and not expose him, in the exercise of such right, to the consequence of violating so vague an injunction."²

2. But it has been common to produce a positive effect, through an injunction out of chancery, by means of a prohibitory order.³ And notwithstanding the practice has been questioned some-

¹ Great North of England, Clarence, & Hartlepool Junction Railway Co. v. Clarence Railway Co., 1 Coll. C. C. 507; Mexborough v. Bower, 7 Beav. 127. But it is said in Isenberg v. East India House Estate Co., 10 Jur. n. s. 221, that a mandatory injunction should be granted with great caution, and should probably be confined to cases where the injury cannot be estimated and sufficiently compensated by a pecuniary payment. And see Jacomb v. Knight, 32 Law J. Ch. 601; s. c. 8 Law T. n. s. 621; Attorney-General v. Metropolitan Board of Works, 9 Law T. n. s. 139.

² Cother v. Midland Railway Co., 2 Phillips, 469; 5 Railw. Cas. 187. And the same doctrine is maintained in Dover Harbor v. London, Chatham, & Dover Railway Co., 30 Law J. Ch. 474; Tillett v. Charing Cross Co., 26 Beav. 419; s. c. 5 Jur. n. s. 994.

³ Lane v. Newdigate, 10 Ves. 192.

times,⁴ it has continued to receive the countenance of the courts of equity.⁵ A mandatory order is nothing more than a decree of specific performance, which is every day's practice in courts of equity, and which is seldom denied, unless where the remedy at law is perfectly adequate.⁶

3. A court of equity will not grant an injunction against a non-resident trustee of railway mortgage bonds, the purpose of which is to transfer a litigation pending in the courts of the state where such trustee resides into another forum for decision.⁷

4. The question of courts of equity issuing mandatory injunctions was considerably discussed in a case in the Court of Chancery Appeal.⁸ The point is thus stated in the head-note: In this as in other cases of injury to easements the court looks to the particular circumstances of each case; but it will interfere by way of mandatory injunction only in cases where extreme or very serious damage will ensue from non-interference.

5. The court here very distinctly repudiate the proposition maintained * by the Master of the Rolls in the same case, when before that court, that a court of equity will in all cases reject an application for an injunction where the wrong complained of has already been inflicted,⁹ for the continuing act must cause new damage so long as it is permitted.

⁴ *Blakemore v. Glamorganshire Canal Navigation*, 1 Myl. & K. 154.

⁵ *SHADWELL*, V. C., in *Spencer v. London & Birmingham Railway Co.*, 8 Sim. 193, 198.

⁶ 2 Story Eq. Jurisp. § 727 *et seq.*; *Sears v. Boston*, 16 Pick. 357. But where the plaintiff's part of an agreement consisted in devoting himself to the service of a company, agreed to be formed for the purpose of testing and turning to account certain patents of plaintiff's, which were also agreed to be conveyed to the company when formed, the court declined to decree specific performance of the contract on the part of defendant, inasmuch as they had no power to compel specific performance of the contract on the plaintiff's part. *Stocker v. Wedderburn*, 3 Kay & J. 393; s. c. 30 Law T. 71. See also *Dietrichsen v. Cabburn*, 2 Phillips, 52; *Lumley v. Wagner*, 1 De G. M. & G. 604.

⁷ *Bellows Falls Bank v. Rutland & Burlington Railroad Co.*, 28 Vt. 470.

⁸ *Durrell v. Pritchard*, 12 Jur. n. s. 16; s. c. Law Rep. 1 Ch. 244. The court here held, that a mandatory injunction may be granted where the injury is already complete, whether to easements or other rights, but only to prevent very serious damage

⁹ *Deere v. Guest*, 1 Myl. & C. 516; *Durrell v. Pritchard* 11 Jur. n. s. 576.

SECTION XVIII.

Remedy provided in Charter does not supersede resort to Equity.

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| 1. Special provisions of charter do not commonly affect the jurisdiction of courts of equity. | 2. Recent English statutes supersede such jurisdiction chiefly in suits at law. |
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§ 222. 1. In most of the cases where the court interferes by injunction in favor of land-owners and others, the party has a remedy under the provisions of the act. But this does not defeat the jurisdiction of the court, under the usual restrictions and limitations which regulate the jurisdiction of courts of equity in regard to legal rights.¹

2. It is now understood by the profession, doubtless, that by the recent statutes in England it is competent to obtain an injunction at law, at the time of issuing the summons in the action; and at the final hearing such injunction may be made perpetual, or discharged, as justice shall require; and in case of disobedience, such writ of injunction may be enforced by the court by attachment, or, when such court shall not be sitting, by a single judge at chambers. This injunction may also be applied for at any stage of the proceedings at law. These statutory provisions serve pretty effectually to supersede the necessity of any resort to courts of equity, in aid of legal rights and remedies, in the courts of common law. But in practice it is said that equitable remedies are still sought almost exclusively in the courts of equity there, the same as before these provisions were extended to the courts of law.

¹ *Coats v. Clarence Railway Co.*, 1 Russ. & M. 181.

*SECTION XIX.

Wilful Breaches of Injunctions.

1, 2. What constitutes a breach ; what excuses. Punishment by sequestration.

§ 223. 1. In a late case before Vice-Chancellor KNIGHT BRUCE,¹ an injunction (*a*) had issued, restraining the defendants from further interfering with a particular road, and from so constructing their works as to obstruct, impede, or render less secure such road. The company then laid their permanent rails over the road, on a level, and by direction of the commissioners of railways erected gates across the road for the security of passengers, and with the sanction of the commissioner opened the line for public traffic. The court, on application to punish the company for disobedience of the order, directed a sequestration to issue, and under the particular circumstances refused to suspend the order until an appeal could be heard. The language of the learned judge is worth repeating :—

2. “ Then comes the question, what, if any thing, the court ought to do,— because it does not necessarily follow that the process asked must issue. It is upon the defendants, however, to make a case to exempt them from it ; and perhaps, if they had shown their proceedings not to be plainly and clearly illegal, — I mean illegal independently of any question of contempt, — or had satisfied the court that the injunction ought not to have been granted at all, or ought to be dissolved, discharged, or put into a shape more favorable to them than it is ; or had stated that they

¹ Attorney-General *v.* Great Northern Railway Co., 4 De G. & S. 75 ; s. c. 3 Eng. L. & Eq. 263 ; Attorney-General *v.* London & Southwestern Railway Co., 3 De G. & S. 439.

(*a*) To deliver property previously sold is a violation of an injunction to restrain the defendant from disposing of property. *Jewett v. Bowman*, 27 N. J. Eq. 171. The pendency of an appeal will make no difference in the punishment for contempt in violation of an injunction. *Troy & Boston Railroad Co. v. Boston, Hoosac Tunnel, & Western Railway Co.*, 57 How. Pr. 181. But the advice of reputable counsel will excuse when it was chiefly desired to obtain a construction of the order. *Dinsmore v. Louisville, New Albany, & Chicago Railroad Co.*, 3 Fed. Rep. 593. See *Wisconsin Central Railroad Co. v. Smith*, 52 Wis. 140 ; *State v. Cutler*, 13 Kan. 131.

had appealed from it, or from the order granting it, or intended to do so, I might have declined or delayed allowing the process to go. But none of these things have they done. On the contrary, my belief is strengthened of the utter impropriety, without any reference to the injunction of this suit, of the acts alleged to be also a contempt of this court. My opinion is more fixed, that the injunction, instead of going too far, does not go far enough, and that it is one of which the company cannot justly complain. Considering their conduct to be at once contemptuous and otherwise illegal; * to be wrongful as against the plaintiff individually, wrongful as against her Majesty's subjects at large, and, indeed, a bad — I had almost said a scandalous — example; whatever amount of inconvenience may result from acting against the company on this occasion, I think it right to deal with them according to their merits. The consequence may possibly be to stop the railway. I answer again that it ought to be stopped, for it passes where it does by wrong. The directors of the company, their agents and servants, cannot, on this motion, be committed to prison; but what can be done shall by me be done to repress this daring invasion of public and private rights, — an invasion maintained moreover in open defiance of all law, authority, and order. Let a sequestration issue." ²

SECTION XX.

Questions of Costs in Equity.

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| 1. Costs commonly awarded to prevailing party. | 2. If parties compromise merits, court will not decide question of costs. |
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§ 224. 1. Costs in courts of equity do not follow the result of the decision as in cases at law. It is requisite that the court

² But the court refused to grant an attachment against a railway company for disobedience to a writ of injunction, enjoining the giving of an undue preference in the carriage of coals, to persons carrying from Peterborough and other places to certain other places named in the rule, the affidavits on the part of the company showing a *bona fide* intention to conform to the order of the court, although it appeared that the reformed scale of charges still operated in some respects injuriously to the plaintiffs and advantageously to the other parties. *Ransome v. Eastern Counties Railway Co.*, 4 C. B. N. S. 185.

order costs, to entitle the party to claim them.¹ But it is now the settled practice of the courts of equity to give the prevailing party costs,² unless there are some very peculiar circumstances, whereby he is not entitled to claim costs, as that of a mortgagee in possession who has not been offered the amount due upon the mortgage,³ and some others.

2. But courts of equity have always declined to determine a *question of costs merely.⁴ If the parties have compromised the merits of the cause, or referred it to arbitrators, and reserved the question of costs for the court of equity, that court will ordinarily decline to try the whole case in order to determine a question of costs, but will leave each party to pay his own costs.⁴

SECTION XXI.

Suits on behalf of Others.

§ 224 a. A shareholder is not precluded from bringing a suit on behalf of himself and other shareholders, although he may be the only one desiring to sue. And if the party bringing the suit on behalf of himself and others have so conducted as to preclude his right to sue, he cannot maintain the suit, because there are others for whose benefit the suit is brought, not affected in the same manner with himself.¹

¹ *Travis v. Waters*, 1 Johns. Ch. 85; s. c. 12 Johns. 500.

² *Perine v. Swaim*, 2 Johns. Ch. 475.

³ *Catlin v. Harned*, 3 Johns. Ch. 61. And in a recent English case, *Stocker v. Wedderburn*, 3 Kay & J. 398; s. c. 30 Law T. 72, Vice-Chancellor WOOD, having given judgment against the plaintiff on demurrer, ordered that he should pay costs, notwithstanding the general equity of his claim, saying, "I am not bound to assume that all the allegations in the bill are true, for the purpose of determining who shall pay costs; otherwise in every case defendants might be driven to defend a case up to the hearing, instead of demurring, in order to save costs."

⁴ Lord HARDWICKE, in 2 Ves. Sen. 222, 223, 284; Chancellor KENT, in *Eastburn v. Downes*, 2 Johns. Ch. 317. But some exceptions have been reluctantly admitted, under protest. *Tower v. Eastern Counties Railway Co.*, 3 Railw. Cas. 374.

¹ *Burt v. British Nation Life Assurance Ass.*, 4 De G. & J. 158; s. c. 5 Jur. n. s. 612.

SECTION XXII.

Receivers — Their Appointment and Duties.

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| <p>1, 3. Railways often put into the hands of receivers.</p> <p>n. (a). Appointment matter of discretion. Not made unless interests of creditors clearly require, &c.</p> <p>2. Appointed where necessary to reach income of estate.</p> <p>n. (b). Not where there is no ground but interest in arrear.</p> <p>4. Appointment of receiver, legitimate mode of granting execution in equity.</p> <p>5. Receiver not subject to the process of any court other than that by which he is appointed. Exceptions.</p> | <p>6. Appointment does not affect the priority of liens.</p> <p>7. Subsequent mortgagee may have receiver.</p> <p>8. Court will appoint one receiver in all suits of same character affecting the same property.</p> <p>9. Receiver represents only parties to particular suit or their privies.</p> <p>10. Liable for money in his hands like other trustees. Joint receivers jointly liable for money and interest.</p> <p>11. Any person to whom receivership funds come, liable as receiver.</p> <p>12. So of one having custody of the funds.</p> |
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§ 224 b. 1. In consequence of railway projects and railway enterprises after going into operation sometimes proving unproductive, * and having either to be abandoned and wound up, or else to change ownership, in satisfaction of mortgages and other liens, it often becomes necessary to place the works in the hands of a receiver of the court, who will hold the money earned upon special deposit, subject to the final or interlocutory order of the court. (a)

(a) The appointment of a receiver is generally in the sound discretion of the court. See *Rice v. St. Paul & Pacific Railroad Co.*, 24 Minn. 464. An order making such an appointment is an administrative rather than a judicial order, and may be changed with consent of the parties. *In re Savannah & Charleston Railroad Co.*, 8 S. C. 207. A receiver should not be appointed unless the interests of creditors unmistakably require it. *Sage v. Memphis & Louisville Railroad Co.*, 18 Fed. Rep. 571. Nor without notice, unless in a case of great urgency.

Railway Co. v. Jewett, 37 Ohio St. 649; *State v. Jacksonville, Pensacola, & Mobile Railroad Co.*, 15 Fla. 201. And see *Cook v. Detroit & Milwaukee Railroad Co.*, 45 Mich. 453. Nor of property not in possession of a party. *Searls v. Jacksonville Railroad Co.*, 2 Woods, 621. Nor should the office be conferred on a party to the cause. *Young v. Rollins*, 85 N. C. 485. Whether the Federal Supreme Court will appoint a receiver in a cause pending on appeal, *quære*. *Missouri Pacific Railroad Co. v. Ketchum*, 95 U. S. 1. As to appointment of re-

2. The rule in courts of equity in regard to appointing a receiver of mortgaged property is, that it will be granted in all cases where the income of the estate is required to meet the incumbrance, and is at the present time being so applied as not to be legally applicable to reduce the incumbrance. (*b*)

3. The cases are very numerous, both in the English and American books, where the property of corporations has been sequestered by virtue of an order in a court of chancery, and placed under the custody, control, and management of a court of chancery through the agency of a manager or receiver.¹ In a late case in Vermont, *Cheever v. Rutland & Burlington Railway*, 39 Vt. 653, where a controversy existed between different mortgagees as to the possession of a railway and its furniture and fixtures, the court said: The ground on which courts of equity intervene, either by injunction or the appointment of a receiver, is the preservation of the property in controversy pending the litigation. But where the mortgagor, or his assigns, are in possession, denying the right of the mortgagee to a foreclosure, the court will not, upon the mere basis of the mortgagee's prior right at law, transfer the possession of the property to him, pending the litigation. The most which can be done in such case is to appoint a receiver to preserve the property and its issues for the party ultimately entitled.

4. And it was said by Lord ELDON,² that it afforded no invincible obstacle to the court appointing a manager or receiver to have charge of the business of a corporation, that it might subject the

¹ *Harvey v. East India Co.*, 2 Vern. 396; *Adley v. Whitstable*, 17 Ves. 315, 323; *Taylor v. Waters*, 15 Ves. 10; *Chase's Case*, 1 Bland, 213; *Williamson v. Wilson*, 1 Bland, 421; *King v. Odom*, 3 Bland, 407.

² *Adley v. Whitstable*, 17 Ves. 315, 323.

ceivers in supplemental proceedings, see *Clinch v. South Side Railroad Co.*, 4 Thomp. & C. 483.

The court as a condition of making the appointment may impose such terms as to application of the income to payment of debts, &c., as under the circumstances may appear equitable. *Union Trust Co. v. Souther*, 107 U. S. 591; *Same v. Walker*, 107 U. S. 596.

(*b*) A receiver will not be appointed merely because interest under a mortgage is in arrear, though the mortgagee is entitled to possession which is refused, it not appearing that otherwise ultimate loss will fall on the mortgagee. *Union Trust Co. v. St. Louis, Iron Mountain, & Southern Railroad Co.*, 4 Dillon, 114.

court to the care and responsibility of conducting for the time the business of the company. That in equity becomes indispensable, in order to enforce the execution of a judgment or lien against them. But the court will so modify its order as to do as little * injury as possible, and to assume as little charge or responsibility as practicable.³

5. The rules of the courts of equity in regard to the office and agency of a receiver are very strict and stringent. The property while in his custody is regarded as in legal contemplation in the custody of the court.⁴ (c) The assets are thenceforth *in gremio legis*, and cannot be seized by process from any other court.⁴ And as a general thing, while a railway corporation is in the hands of a receiver, the receiver is regarded as the acting party, and alone responsible to other parties, who may receive injuries

* Where the receiver of a railway company was appointed to receive the rents, issues, and profits of the railway, it was held that it was his duty to receive the gross receipts of the company for the carriage of passengers, freights, mails, and the like, and to pay the bills for running expenses thereout, and not to receive only the surplus after paying the expenses. *Simpson v. Ottawa & Prescott Railway Co.*, 10 U. C. L. J. 108.

⁴ *Peale v. Phillips*, 14 How. 368.

(c) A receiver cannot be sued for assets in his hands, or disturbed in possession or management, without leave of the court by which he was appointed. *De Graffenried v. Brunswick & Albany Railroad Co.*, 57 Ga. 22. And see *Merrill v. Central Vermont Railroad Co.*, 54 Vt. 200; *Wabash Railway Co. v. Brown*, 5 Brad. 590; *Massachusetts Mutual Life Insurance Co. v. Chicago & Alton Railroad Co.*, 13 Fed. Rep. 857. But see *Wyatt v. Ohio & Mississippi Railroad Co.*, 10 Brad. 289; *St. Joseph & Denver Railroad Co. v. Smith*, 19 Kan. 225; *Allen v. Central Railroad Co.*, 42 Iowa, 683. The rule exempting the receiver from process from other courts applies to suits for damages or on money demands as well as to suits for the property. *Barton v. Barbour*, 104 U. S. 126; *Kennedy v. Railroad Co.*, 2 Flip-

pin, 704. Thus an action against a receiver upon a cause sounding merely in tort cannot be brought without permission of the Chancellor, but such permission cannot be refused unless the claim is manifestly unfounded and vexatious. *Palys v. Jewett*, 32 N. J. Eq. 302. Nor is property in the custody of a receiver subject to attachment. *Gest v. New Orleans, St. Louis, & Chicago Railroad Co.*, 30 La. An. 28; *Secor v. Toledo, Peoria, & Warsaw Railroad Co.*, 7 Bissell, 513. But the appointment of a receiver does not abate causes already pending against the corporation. *Toledo, Wabash, & Western Railway Co. v. Beggs*, 85 Ill. 80. A receiver is not entitled to recognition out of the jurisdiction. *Beers v. Wabash, St. Louis, & Pacific Railroad Co.*, 26 Am. & Eng. Railw. Cas. 441.

by the transacting of the business of the company, either by omission of duty or positive aggression. And although the court will in most instances interfere for the protection of the receiver, on his request, that is not always done, especially where, as in some of the states, railway corporations are kept in the hands of receivers through a succession of years. And where the courts of equity do not interfere to protect the receiver from his ordinary responsibility, measured by his acts, he will be held responsible for all the acts and omissions of the corporation while under his sole control and management.⁵

This subject underwent a very elaborate examination in the Supreme Court of Indiana,⁶ and the following proposition was maintained: That where a railway with all its appurtenances was in the exclusive possession, use, and control of a receiver appointed by a court of competent jurisdiction, and who had the employment and control of all the hands upon the road, the possession of the receiver could not be regarded as the possession of the corporation, neither could the company be held responsible for the acts of any servant or employé of the servant. The position of the corporation is more completely obscured and extinguished, so to speak, by the works being placed under the control of a receiver by compulsory * proceedings in the courts, than by any voluntary surrender of the road and its operation into the hands of lessees or mortgagees, where it has generally been held that the corporation may still be held responsible.⁷

6. The appointment of the receiver does not operate to derange the priority of legal or equitable liens. The money in his hands is in the custody of the law for whoever can make title to it, and when the party entitled to the estate is ascertained, the receiver will be his receiver.⁸

7. Where there are different mortgages, and the first mortgagee does not assume possession of the property, or take any steps

⁵ *Cooley v. Brainerd*, 38 Vt. 394; *Blumenthal v. Same*, 38 Vt. 402.

⁶ *Ohio & Mississippi Railroad Co. v. Davis*, 23 Ind. 553.

⁷ *Supra*, § 142, note 8. See also *Ballou v. Farnham*, 9 Allen, 47; *Lamphear v. Buckingham*, 33 Conn. 237. And receivers operating a railway have been held responsible the same as other owners of a railway, but generally in a different form. *Meara v. Holbrook*, 20 Ohio St. 137; *Potter v. Blundell*, 20 Ohio St. 150.

⁸ *NELSON, J.*, in *Wiswall v. Sampson*, 14 How. 52, 65.

towards foreclosure, any subsequent incumbrancer may take possession, or have a receiver appointed to hold the rents, issues, and profits for his benefit until those who have a prior right claim them by some definite action in that direction.⁹ But where the prior mortgagee takes proceedings to enforce his lien, the same receiver will be appointed in his suit, which is, in fact, but an extension of the receivership so as to include the prior mortgage and suit.⁹ And the subsequent incumbrancer will not be obliged to refund any rents received by himself before the prior incumbrancers took possession or brought suit.¹⁰

8. It is not in conformity with the practice of courts of equity to appoint different persons to be receivers in different suits affecting the same property, but to extend the receivership from time to time as different suits are instituted, so as to have the one receivership embrace the whole property and all the suits.¹¹ And if the former receiver declines to act after the receivership is extended to other suits, he will be discharged, and another appointed embracing all the suits.¹¹

9. It seems to be entirely well settled, that the receiver represents all the parties in the suits wherein he has been appointed, but that he does not represent strangers to the suits or any not in privity with the parties.¹²

* 10. The degree of responsibility of the receiver for money once in his hands is much the same as that of any other trustee. If he mix it with his own money, or deposit it on private account, he thereby becomes responsible for any accident befalling it.¹³ (d)

⁹ *Howell v. Ripley*, 10 Paige, 43.

¹⁰ *Thomas v. Brigstocke*, 4 Russ. 64.

¹¹ *Cagger v. Howard*, 1 Barb. Ch. 368.

¹² *Booth v. Clark*, 16 How. 322; *Porter v. Williams*, 5 How. Pr. 441; s. c. 5 Seld. 142.

¹³ 3 Redf. Wills, 560, and cases cited.

(d) Unless specially authorized to contract debts on faith of the property, a receiver is restricted to the income and profits of the road. *Hand v. Savannah & Charleston Railroad Co.*, 17 S. C. 219. But the court may authorize a receiver to contract indebtedness to take precedence of mortgage debt. *Miltenberger v. Logansport Railway*

Co., 106 U. S. 286. But see *Langdon v. Vermont & Canada Railroad Co.*, 53 Vt. 228, in which difficulties resulting from a long-continued and rather anomalous receivership were brought to a solution. In any case, the earnings in the hands of the receiver are chargeable with running expenses and damages for injuries to persons or property.

It has been held, that where the trustee deposits the money to the credit of the trust with a bank or banker of good credit at the time, and the money is lost through the unexpected insolvency of the depositary, he will not be held accountable.¹⁴ But if he deposit the money in his own name, or part with the control of it to any extent, even to permitting a surety to have a veto upon drawing it, and the banker fail, he must bear the loss.¹⁵ Where two are appointed joint receivers of a corporation, for the purpose of winding up its concerns, and one of them misapplies the funds, and the other is guilty of gross neglect of duty, in giving no attention to the business of the trust, they will be held jointly responsible for the amount found due in settling their accounts, and will be charged with interest on the same from the time the money was so misapplied.¹⁶

11. All persons in whose hands the trust funds can be traced and identified will be responsible for their restoration, as becoming themselves involuntary trustees, or trustees *in invitum*. This is a familiar principle of equity law, applicable to all matters of trust, and illustrated by numerous decisions.¹⁷ This principle is illustrated in one case, where the receiver paid over the money in pursuance of a garnishee's order, supposing it proper that it should go in that direction, but the court, being of a different opinion, ordered the person to whom it had been so paid to refund the money.¹⁸ And in the same case,¹⁸ the Master of the Rolls said:

¹⁴ Knight v. Plymouth, 3 Atk. 480; Rowth v. Howell, 5 Ves. 565.

¹⁵ Massey v. Banner, 4 Mad. 416, 417; Clarke v. Tipping, 9 Beav. 284; White v. Baugh, 9 Bligh, n. s. 181; s. c. 3 Cl. & F. 44; Thew v. Kiston, 1 Ves. 377.

¹⁶ Commonwealth v. Eagle Insurance Co., 14 Allen, 844.

¹⁷ Bodenham v. Hoskins, 2 De G. M. & G. 903; s. c. 21 Eng. L. & Eq. 643.

¹⁸ De Winton v. Mayor of Brecon, 28 Beav. 200.

Mobile & Ohio Railroad Co. v. Davis, Cas. 442; Klein v. Jewett, 26 N. J. 62 Miss. 271. The receiver is liable for injuries to others, resulting from the operating of the road, to the same extent that but for the receivership the company would itself be liable. Ohio & Mississippi Railroad Co., 10 Brad. 313; Rogers v. Mobile & Ohio Railroad Co., 12 Am. & Eng. Railw. Eq. 474. A receiver is not personally liable for torts of an employé. Davis v. Duncan, 17 Am. & Eng. Railw. Cas. 359. After a receiver has been discharged, no action can be maintained against him. Farmers' Loan & Trust Co. v. Central Railroad Co., 2 McCrary, 181. See Ryan v. Hays, 62 Tex. 42.

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"The receiver could not have received any thing except under the order of the court, and the money is therefore strictly money belonging to the court, and the receiver can only discharge himself by paying obedience to its order."

12. Where property is laid under an injunction by a court of equity and placed in the hands of a manager or receiver, every person concerned in the custody or disbursement of the receipts of such property, or in its use, is responsible to refund the same to the court to enable it to decree the same to the parties found ultimately to be entitled to it.¹⁹

¹⁹ *In re Ward*, 31 Beav. 1; *Lane v. Sterne*, 3 Gif. 629; s. c. 9 Jur. n. s. 320.

* CHAPTER XXX.

INDICTMENT.

SECTION I.

Indictment of Railway Company.

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| <ol style="list-style-type: none"> 1. Company liable to indictment for obstructing public highway. 2. Company liable to indictment for misfeasance as well as for non-feasance. 3. Not liable to indictment for disturbing quiet by proper use of locomotives. 4. Company having the right to divert highways, it is for jury to determine whether it is done in a reasonable manner. | <ol style="list-style-type: none"> 5. Requisite only that it produce no serious public inconvenience. 6. Order, or conviction of company, in relation to repair of highways, may be general. 7. Signals required to be given at highway crossing on level. n. 2. Review of the cases upon the subject. |
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§ 225. 1. RAILWAY companies are liable to indictment for obstructing a public highway contrary to the powers granted in their act. For instance, obstructing a carriage turnpike-road, by the piers of a railway bridge.¹ So also for cutting off a public highway, and obstructing travel upon it, without, or before constructing a substitute in the manner required by their act.² (a)

¹ *Regina v. Rigby*, 14 Q. B. 687; s. c. 6 Railw. Cas. 479. The footpaths on the bridge are not to be reckoned as a part of the requisite width of the bridge. *Supra*, § 108. See also *Bristol & Exeter Railway Co. v. Tucker*, 13 C. B. N. s. 207; s. c. 7 Law T. N. s. 464; *Fosberry v. Waterford & Limerick Railway Co.*, 13 Ir. Com. Law, 411. An indictment cannot be sustained against a railway company for a nuisance in the obstruction of a highway while it is under the sole management of a receiver appointed by the Court of Chancery, over whose acts the company have no control. *State v. Vermont Central Railroad Co.*, 30 Vt. 108. But on an indictment for obstructing a highway, if it appear that the obstruction has been removed, that is substantially an end of the proceedings, the object having been already attained. *Per WIGHTMAN, J.*, *Regina v. Paget*, 3 Fost. & F. 29.

² *Queen v. Scott*, 3 Q. B. 543. This is an indictment against the officers and agents of the company. But it is held the company is also liable to in-

(a) So where a highway is taken is not substituted within a reasonable for railway purposes, and a new way time. *Pittsburg, Virginia, & Charles-*

The * company may use the highways for making up their trains to a reasonable extent, if they do not abridge the rights of others

dictment. *Queen v. Great North of England Railway Co.*, 9 Q. B. 315; *State v. Vermont Central Railroad Co.*, 27 Vt. 103. *Supra*, § 180; *Commonwealth v. Nashua & Lowell Railroad Co.*, 2 Gray, 54; *Springfield v. Connecticut River Railroad Co.*, 4 Cush. 63; *Commonwealth v. New Bedford Bridge Co.*, 2 Gray, 339. This subject was discussed in *Regina v. Birmingham & Gloucester Railway Co.*, 9 C. & P. 469; s. c. 3 Q. B. 223, and the same result reached as in *Queen v. Great North of England Railway Co.* The opinion of PATTERSON, J., 3 Q. B. 231, when the former case was determined in the Queen's Bench, embraces a brief and comprehensive abstract of the early English decisions on the subject.

In this country the subject has been somewhat discussed and variously determined. In addition to the cases already cited in this note, see *State v. Morris & Essex Railroad Co.*, 3 Zab. 365, where the general views stated in the text are maintained. This case was on an indictment against the *Morris & Essex Railroad Co.*, for a nuisance in erecting and continuing a building, and also for leaving cars in the highway, and the indictment was sustained, the court saying that "a corporation cannot be liable for any crime of which a corrupt intent, or *malus animus*, is an essential ingredient. But the creation of a mere nuisance involves no such element." See also *Lyman v. White River Bridge Co.*, 2 Aiken, 255; *Dater v. Troy Turnpike & Railroad Co.*, 2 Hill, 629; *Bloodgood v. Mohawk & Hudson Railroad Co.*, 18 Wend. 9; *Chestnut Hill Turnpike Co. v. Rutter*, 4 S. & R. 6, 16; *Whiteman v. Wilmington & Susquehanna Railroad Co.*, 2 Harring. Del. 514.

The English courts make no question in regard to corporations aggregate being liable for torts committed by their agents in the proper business of the company. *Glover v. Northwestern Railway Co.*, 19 Law J. 172; *Duncan v. Surrey Canal Co.*, 3 Stark. 50. See *infra*, § 226, pl. 8; *Ellis v. London &*

ton Railway Co. v. Commonwealth, 10 Am. & Eng. Railw. Cas. 321. Where a statute provides that company shall not occupy a highway with cars more than a certain number of minutes, it is no defence that the obstruction was accidental and without intent to obstruct, and that reasonable diligence was used to remove the obstruction; nor that the greatest care is used to select and instruct employes. *Commonwealth v. New York, New Haven, & Hartford Railroad Co.*, 112 Mass. 412. See *Danville, Hazleton, & Wilkesbarre Railroad Co. v. Commonwealth*, 73 Penn. St. 29; *Northern Central Railway Co. v. Commonwealth*, 90 Penn. St. 300.

Indictments lie against railway companies by statute in cases not mentioned in the text of this section e. g., in Massachusetts and New Hampshire, for the negligent infliction of injuries causing death. These matters are referred to elsewhere.

A corporation charged with a criminal offence is properly brought into court by service of a copy of the summons on one of its officers or agents. *State v. Western North Carolina Railroad Co.*, 89 N. C. 584.

having * equal right to use them ; but they have no right to make use of the highway as part of their freight-yard.³

2. It has sometimes been maintained that a corporation aggregate is not liable to indictment for misfeasance, but only for nonfeasance. But the case of *Regina v. Great North of England Railway*² settled that question upon elaborate argument and great consideration.⁴ (b)

It was held that where the surveyors of highways object to a * road which has been substituted for a former road, they are not authorized to obstruct it, but must enforce the usual legal remedies upon the company, by mandamus, indictment, or bill in equity, as the case may be.⁵

3. But where by their act a railway company are permitted to build their road, and run locomotive engines parallel and adjacent to an ancient highway, whereby the horses of persons using the highway as a carriage road are frightened, it was held, on indictment against the company for a nuisance, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, and that the company were therefore not liable.⁶

Southwestern Railway Co., 2 H. & N. 424. And in *Commonwealth v. Old Colony & Fall River Railroad Co.*, 14 Gray, 93, it was held, that a railway laid out and over a public highway, so as to obstruct it, without express authority or necessary implication from the statute, was indictable as a nuisance. *Hewett v. Swift*, 3 Allen, 420.

³ *Gahagan v. Boston & Lowell Railroad Co.*, 1 Allen, 187. Nor for loading and unloading its cars. *Matthews v. Kelsey*, 58 Me. 56.

⁴ A railway will be restrained, at the suit of the Attorney-General, on the relation of a stranger, from carrying on other business beyond the scope of its powers. *Attorney-General v. Great Northern Railway Co.*, 1 Drewry & S. 154.

⁵ *London & Brighton Railway Co. v. Blake*, 2 Railw. Cas. 322.

⁶ *King v. Pease*, 4 B. & Ad. 30. It is made a question how far a nuisance may be justified on the ground that public benefits have resulted from the works causing the alleged nuisance. *King v. Russell*, 6 B. & C. 566. In this case the affirmative is held by two judges, against Lord TENTERDEN. One would conjecture that the opinion of the chief justice is the law on that subject. But there can be little doubt, perhaps, that when the legislature allow that to be done which would otherwise be a nuisance, it will be valid, on the ground that they are the proper judges when the public good requires the works. *King v. Morris*, 1 B. & Ad. 441.

(b) A railway company may be indicted for the creation and maintenance of a public nuisance. *North Central Railway Co. v. Commonwealth*, 90 Penn. St. 300.

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4. By their charter a company were empowered "to divert or alter any roads or ways, in order the more conveniently to carry the same over or under the railway." The company, in carrying a road under the railway, had erected a skew bridge, which diverted the road at an angle of 45° instead of 34° , which was the angle made at that particular point by the old line of road. At the trial of an indictment against the company's engineer for so doing, the learned judge directed the jury, that if the public sustained inconvenience by the alteration, they should find for the crown. But if they thought that no material practical inconvenience was sustained by the public in having the present bridge instead of the other, and that an experienced engineer would have so constructed it, having regard both to the interest of the public and the company, they had a right to make such diversion, and the verdict should be for defendant. The verdict being for defendant, with leave to move the full bench to enter a verdict for the crown, and the question being discussed, the court declined to interfere.⁷

* 5. Lord DENMAN, C. J., said: "It is impossible that a verdict should be entered for the crown. In the case of obstruction of light, we leave it to the jury whether any real inconvenience is sustained, though some light may demonstrably be obscured." PARKE, B., said at the trial, "that in a case before him, *Regina v. London and Southampton Railway*, as to the power which a company had to make a road over a public highway, he laid it down, that, if possible, the work must be constructed without any inconvenience to the public, but if it could not be done without some such inconvenience, it must be done with the least possible."

6. An order of justices upon a railway for repair of a highway, in regard to damage done by them, need not state the particulars of damage or repair; it is sufficient to state the length of the damaged part of the road, and order the company to make good all damage done. The order and conviction for disobedience may include several highways in the same parish.⁸

7. A statute requiring signals to be given by the whistle or bell of the locomotive, within certain prescribed distance of any cross-

⁷ *Queen v. Sharpe*, 3 Railw. Cas. 38.

⁸ *London & Northwestern Railway Co. v. Wetherall*, 2 Eng. L. & Eq. 265; s. c. 15 Jur. 247.

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ing of a highway upon a level with the railway, requires the signal before the crossing, and not after.⁹

Indictment to recover the fine imposed upon a railway, where the life of a person is lost by carelessness thereon, must be against the company, and not against the individual stockholders, and when the fine goes to the surviving relatives of the deceased, the indictment should show that there are such surviving relatives.¹⁰

⁹ *Wilson v. Rochester & Syracuse Railroad Co.*, 16 Barb. 167.

¹⁰ *State v. Gilmore*, 4 Fost. N. H. 461. The owner of works, carried on for his profit by his servants, may be indicted for a public nuisance caused by their act, while carrying on the works, although done without special direction, and contrary to his general order. *Queen v. Stephens*, Law Rep. 1 Q. B. 702. A railway company, duly authorized to lay its track in a street of a city, are not, without proof of negligence, liable for accidental injuries resulting to individuals thereby. Proof of negligence, or want of care or skill in the manner of constructing and maintaining the track, is necessary to entitle a person whose property sustains damage thereby, as by a horse catching the hoof between the rails of the track, to maintain an action therefor. *Mazetti v. New York & Harlem Railroad Co.*, 3 E. D. Smith, 98. In a late English case at *nisi prius*, on an indictment of an engine-driver and a fireman of a railway train for manslaughter in killing people on a preceding train, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the usual rules, and altered the signal for danger so as to make it mean "proceed with caution;" that the trains were started irregularly by the superior officers of the company at intervals of about five minutes; that the preceding train had stopped for three minutes without any notice to the following train except the signal for caution, and that the following train was being driven at an excessive rate of speed; that they did not slacken immediately on perceiving the signal, but almost immediately; and that as soon as they saw the preceding train they did their best to stop, but without effect. It was held that if the accused honestly believed they were observing the rules as given to them, and if these rules were not obviously illegal, they were not criminally responsible; that the fireman being bound to obey the directions of the engine-driver, and so far as appeared having done so, there was no case against him; that even against the engine-driver, although there was evidence of excessive speed and insufficient lookout, the evidence was so slight that it would be reserved for the court of criminal appeal whether there was any case at all. *Regina v. Trainer*, 4 Fost. & F. 105. And see *Regina v. Bengé*, 4 Fost. & F. 504.

* SECTION II.

Railways as Public Nuisances.

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| <ol style="list-style-type: none"> 1. Use of public streets by railway by permission of municipal authorities, not a nuisance <i>per se</i>. <li style="padding-left: 20px;">n. (a). But an improper and unreasonable exercise of the right may make it a nuisance. 2. Use of locomotives in vicinity of a church on Sunday may become a nuisance. 3. Municipal authorities may grant railway leave to use streets or to tunnel, right of public to use street not being unreasonably abridged. 4. But company must not unnecessarily interfere with comfort of others in such use. | <ol style="list-style-type: none"> 5. Slight obstruction of navigable waters by railway company, authorized by act of legislature, not a nuisance. 6. Such grants construed strictly. Any excess of authority becomes a nuisance. 7. Company not justified in building stations for passengers or freight in highway. 8. Aggrieved person can only apply to courts for a remedy. 9. Nor can one suffering in common with others, but in a greater degree, maintain an action. |
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§ 226. 1. A railway passing through the streets of a populous village or city is not of course a nuisance.¹ (a) But it has been

¹ *Hentz v. Long Island Railroad Co.*, 13 Barb. 646; *New Albany & Salem Railroad Co. v. O'Dailey*, 12 Ind. 551.

(a) Not a nuisance *per se*. *Wabash, St. Louis, & Pacific Railway Co. v. People*, 12 Brad. 448. If lawfully built, with proper care and skill. *Uline v. New York Central & Hudson River Railroad Co.*, 23 Am. & Eng. Railw. Cas. 3. But an improper and unreasonable exercise of the right to use a street may make the road a nuisance. *State v. Louisville, New Albany, & Chicago Railway Co.*, 86 Ind. 114. For instance, the conveyance by cars of offensive matter infecting the whole atmosphere. *Neitzey v. Baltimore & Potomac Railroad Co.*, 26 Am. & Eng. Railw. Cas. 546. And where by its charter a town has supervision of its streets and power to define and abate nuisances, the authorities may in the absence of statute by

ordinance declare the use of steam as a motor on the streets a nuisance. *North Chicago City Railway Co. v. Lake View*, 105 Ill. 207. But in general, the escape of soot, smoke, &c., the obstruction of streets, and the jarring of buildings by passing trains, &c., do not constitute a nuisance. *Randle v. Pacific Railroad Co.*, 65 Mo. 325. But see *Neitzey v. Baltimore & Potomac Railroad Co.*, 26 Am. & Eng. Railw. Cas. 546. See *Cain v. Chicago, Rock Island, & Pacific Railroad Co.*, 54 Iowa, 255. The erection of a mortar mill by the company on its own land for the construction of its works may, by the noise and vibration, be a nuisance as to adjoining proprietors. *Fenwick v. East London Railway Co.*, Law Rep. 20 Eq. Cas. 514.

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held, that a city has such interest in the soil of its streets, that the legislature cannot empower a railway company to use them for a railway track without compensation, and that it pertains to the corporation of a city to determine the mode of propelling cars * within its limits, whether by steam or horse power, and the rate of speed.²

2. It was held, that a railway company, having, by running their cars and engines and ringing bells, whistling, letting off steam, &c., upon Sunday, in the immediate vicinity of a church, so annoyed and molested the congregation worshipping there, as greatly to depreciate the value of the house, and render the same unfit for religious worship, were liable to an action at the suit of the church in its corporate capacity.³ (b) It seems that a court of equity will not enjoin a street railway company from running their cars upon Sunday in violation of the statutes of the state.⁴ The proper remedy is by enforcing the penalty of the statute, or by indictment for nuisance, when the prosecutor suffers damage only in common with other citizens.

3. A railway may use the public streets for their vehicles, by license from the city authorities, when such use does not unreasonably abridge the public use of such streets for other purposes.⁵ Where a railway was authorized by the municipal authorities of a city to build a tunnel through the city, an injunction was denied, at the suit of a land-owner claiming the work to be a nuisance.⁶

² *Donnaber v. State*, 8 Sm. & M. 649; *Moses v. Pittsburg Railroad Co.*, 21 Ill. 516.

³ *First Baptist Church v. Schenectady & Troy Railroad Co.*, 5 Barb. 79. But see *Same v. Utica & Schenectady Railroad Co.*, 6 Barb. 813, where it is held that the action will not lie in the name of the corporation, the damage being to the worshippers, and not to the corporators. But from a note to the case it appears that it was decided before that reported 5 Barb. 79, and probably not brought to the attention of the court in that case.

⁴ *Sparhawk v. Union Passenger Railroad Co.*, 54 Penn. St. 401.

⁵ *Drake v. Hudson River Railroad Co.*, 7 Barb. 508.

⁶ *Hodgkinson v. Long Island Railroad Co.*, 4 Edw. Ch. 411. And the Court of Common Pleas, New York city, refused to restrain the city councils from rescinding an ordinance prohibiting the use of steam power on railways

(b) A railway workshop adjoining Fifth Baptist Church, 11 Am. & Eng. a church may be declared a nuisance. Railw. Cas. 15.
Baltimore & Potomac Railroad Co. v.

* 4. On demurrer to a declaration, alleging that a railway company obstructed a public street adjoining the plaintiff's house, that they kept up dangerous fires and did various other acts that made his residence unwholesome and uncomfortable, and that they did these things unlawfully and with intent to injure him, it was held to be a good cause of action, as the court could not presume such acts to be lawful under the particular circumstances; but if the company claimed the right to do such acts at the time and place, it was incumbent upon them to show such right, by plea or otherwise.⁷

5. And it was held, that the slight but unavoidable obstruction of public navigable rivers by a railway company, under the authority of the state legislature, is a necessary evil which must be borne for the sake of the public good, which demands it. That which would otherwise be a nuisance, if done under the authority of law for the public good, is justifiable.⁸ It has been held also, that grants to a railway company or similar public work, which unavoidably cause obstruction to the navigation of a navigable river, are not to be regarded as *per se* a nuisance, but lawful.⁹

6. But such grants are to be construed strictly, and if built upon a plan which would occasion obstruction to the navigation beyond what the charter authorized, the works would be a nuisance.⁹ Every erection without legislative permission in a navigable river,

below Forty-second Street. *Teneyck v. New York & Harlem Railroad Co.*, 10 Am. Railw. T. No. 42.

Where a person, without the authority of parliament, but with the concurrence of, and by virtue of a contract with, the vestry of the parish, laid down in one of the streets of the city a double line of tramways on which omnibuses of a peculiar construction plied for hire, and these tramways were dangerous and inconvenient to the public, as the wheels of vehicles skidded when crossing the tramway, and horses putting their feet upon it were startled, this was held to be a public nuisance, even though these tramways were for the public conveyance generally. *Regina v. Train*, 2 B. & S. 640.

⁷ *Parrot v. Cincinnati, Hamilton, & Dayton Railroad Co.*, 3 Ohio St. 330. Where a person was engaged in blasting a stone quarry, and, by using an excessive charge of powder, caused a great quantity of stones to fall on the public highway, and on houses adjacent to the quarry and highway, he was held rightfully convicted on an indictment which charged him with a nuisance to the highway. *Regina v. Mutters*, 1 Leigh & C. 481; s. c. 10 Cox C. C. 6.

⁸ *Attorney-General v. Paterson & Hudson River Railroad Co.*, 1 Stock. 526.

⁹ *Newark Plank-Road Co. v. Elmer*, 1 Stock. 754.

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which obstructs navigation, is a nuisance.⁹ So, too, where a railway company by a wrong construction of their act locate their *road where they are not authorized, it becomes a nuisance on every highway it touches in its illegal course.¹⁰

7. Railways are not justified in building depots for freight or passengers within the limits of the public highway, or so near it that their trains must injuriously obstruct the public travel. The right of the public in the highway is paramount to that of the company, for all other purposes except that of transit.¹¹

8. But it has been said by experienced judges, and with great reason, as it seems to us, that where a railway erect gates, or cause any other obstruction to a public or private way, by means of doing defectively or imperfectly what they had the legal right to do in another form, it is not competent for those who feel themselves aggrieved, or who are in fact so, to take the redress of their wrongs into their own hands, and forcibly remove the obstacle. They should apply to the proper tribunal for a mandamus, or other appropriate remedy.¹²

9. An individual cannot maintain a bill in equity to restrain a nuisance which injures him only in common with the public generally, although in a greater degree. The proper remedy in such case is by information in the name of the Attorney-General, or by indictment. But where a railway company was building its station in the street, in front of the plaintiff's dwelling, he owning the fee of the land, it was held sufficient ground for interference by way of injunction at the suit of the party.¹³

¹⁰ *Commonwealth v. Erie & Northeast Railroad Co.*, 27 Penn. St. 339; *Same v. Vermont & Massachusetts Railroad Co.*, 4 Gray, 22; *Same v. Nashua & Lowell Railroad Co.*, 2 Gray, 54; *Same v. New Bedford Bridge*, 2 Gray, 339, 345.

¹¹ *State v. Morris & Essex Railroad Co.*, 25 N. J. Law, 437; s. c. 3 Zab. 360; *State v. Vermont Central Railroad Co.*, 27 Vt. 108. See also *Commonwealth v. Nashua & Lowell Railroad Co.*, 2 Gray, 54; *Same v. New Bedford Bridge*, 2 Gray, 339; *Same v. Vermont & Massachusetts Railroad Co.*, 4 Gray, 22; *Gerring v. Barfield*, 11 Law T. N. s. 270; s. c. 16 C. B. N. s. 597.

¹² *Ellis v. London & Southwestern Railroad Co.*, 2 H. & N. 424.

¹³ *Higbee v. Camden & Amboy Railroad Co.*, 19 N. J. Eq. 276.

*SECTION III.

Indictment for Offences against Railways.

- | | |
|---|---|
| 1. Obtaining railway tickets by means of false pretences. Forgery of pass.
2. Obstructing railway carriages, or endangering persons therein. | 3. Allegation and proof on indictment therefor.
n. 5. Obstructing track of street railway. |
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§ 227. 1. If one obtain a railway ticket from the company by false pretence, and thus is enabled to travel upon the railway, this is an offence for which an indictment will lie.¹ And if such ticket be fraudulently taken it is larceny, although the ticket would have been delivered up at the end of the journey.² The forging of a railway pass is an offence at common law, but the mere uttering of it is no offence, unless some fraud was actually perpetrated.³ "A railway ticket is a valuable chattel, and an indictment for obtaining it of one of the company's servants, by false pretences, is sustainable; although it is to be given up at the end of the journey, that does not prevent it, while of value to the holder, as enabling him to travel gratis, from being a chattel, the stealing of which or obtaining by false pretence and with intent to defraud the company, is an offence."⁴

* 2. Under the English statute, against doing "any thing to obstruct any engine, or carriage using any railway, or to endanger the safety of any person conveyed in the same," it is not necessary to allege, or prove, that the railway was constructed or worked under the powers of the act of parliament.⁵ It is

¹ Statute 7 & 8 Geo. IV. c. 29, § 53; *Regina v. Boulton*, 3 Cox C. C. 576. On an indictment for conspiracy for the sale and transferring of a railway ticket not transferable, it was held that the prisoners must be acquitted, unless there was a previous concert between them to obtain the ticket for the purpose of fraudulently using it. *Regina v. Absolom*, 1 Fost. & F. 498, *per* WIGHTMAN, J.

² *Regina v. Beecham*, 5 Cox C. C. 181.

³ *Regina v. Boulton*, 2 Car. & K. 604.

⁴ *Regina v. Boulton*, 2 Car. & K. 917, opinion of PARKER, B. In *Regina v. Fitch*, 1 Leigh & C. 159, it was held that a turnpike toll-gate ticket is a receipt for money.

⁵ *Regina v. Bowring*, 10 Jur. 211. An interesting case, involving the right of street railways to an unobstructed track, was recently decided in Massachusetts. It was here held that the driver of a heavily loaded wagon on the highway

enough to show that the respondent wilfully did the act complained of, and that it was of a nature to endanger the safety of persons upon the railway.⁵ And it is no defence in such case, that the respondent did not intend to do any injury.⁵ A person who throws a stone at an engine or carriage upon a railway, may be indicted, under the latter clause of the section,⁵ for doing an act "to endanger the safety of any person," &c. (a)

3. The Massachusetts statute⁶ (b) against obstructing any engine or carriage on a railway, or doing any thing with intent to obstruct, having one wheel in the track of a horse railway, and moving at the usual rate of speed, but slower than cars usually move, is bound to turn off from the track at the request of the conductor of a car, if there is room to do so, although it is usual and much easier to drive such wagons with one wheel in the railway track; and if, by not so turning off for several hundred feet, he obstructs the passage of the car at its usual rate of speed, he is liable to indictment under the statute, prohibiting the wilful and malicious obstruction of the railway, even if he did not enter upon the track with the intention of obstructing the cars, and continued thereon without intending to obstruct them, but merely for his own convenience. The court proceeds on the principle that a franchise to construct, maintain, and use a horse railway over a highway authorizes the grantees to drive their cars at the rate of speed used for vehicles drawn by horses for carrying passengers, so far as this right can be enjoyed without preventing other vehicles on the highway from moving at their usual rate of speed. *Commonwealth v. Temple*, 14 Gray, 69. But under the English statute an intent to commit the act of obstruction was held necessary. *Batting v. Bristol & Exeter Railway Co.*, 9 W. R. 271; s. c. 3 Law T. n. s. 665. And see *Wilbrand v. Eighth Avenue Railroad Co.*, 3 Bosw. 814; *McCarty v. State*, 87 Miss. 411.

Under the statute 3 & 4 Vict. c. 97, § 13, one may be convicted of a misdemeanor for obstructing the line of a railway, although the railway had not yet been opened for passenger traffic, and no engine or car had yet been constructed. * *Regina v. Bradford*, 8 Cox C. C. 809. And see *Roberts v. Preston*, 9 C. B. n. s. 208.

In an indictment for wilfully and maliciously obstructing a street railway company, in the use of its road, the actual enjoyment and use of the franchise by the company will authorize the jury to find its location lawful, there being no evidence to the contrary. And in such case it will not be necessary to show that the defendant was requested to move from the track, and refused to do so, if the jury are satisfied from other evidence that the defendant's conduct in obstructing the cars was wilfully malicious. *Commonwealth v. Hicks*, 7 Allen, 573.

⁵ Gen. Stat. c. 63, §§ 107, 108.

(a) As to pleading under the North Carolina statute forbidding shooting or throwing a missile at a railway car or engine, see *State v. Boyd*, 9 Am. & Eng. Railw. Cas. 155.
(b) Under the New Hampshire

as aforesaid, or with intent to endanger the safety of persons conveyed in or upon the same, is in terms much the same as the English statute just referred to. Under this statute it has been held, that the indictment must allege some act done with criminal intent; that an acquittal of the offence of obstructing is no bar to an indictment charging the same person with the offence of doing an act with intent to obstruct; that proof of the charter and of the existence and operation of a corporation is sufficient even in criminal proceedings to show its existence and ownership of property; that under an indictment charging the defendant with doing an act with intent to obstruct engines and carriages passing upon a railway and endanger the persons conveyed in them, if the act done would naturally produce the consequences alleged, the jury may infer that such was the defendant's intent; and an indictment charging the defendant with doing an act with intent to obstruct the engines passing upon a railway, may be maintained by proof of acts which caused an actual obstruction of such engines.⁷

⁷ *Commonwealth v. Bakeman*, 105 Mass. 53.

statute it is enough that the defendant endangered life, and no defence, the act being wilful, that he did not intend to endanger life, but intended other mischief. *State v. Beckman*, 57 N. H. 174. Under the Texas statute it is necessary to show that the obstruction might have endangered human life. *Bullion v. State*, 7 Tex. Ap. 462. And under that of Minnesota, it is necessary only that the obstruction was likely to do the mischief forbidden, not that it actually did. *State v. Kilty*, 9 Am. & Eng. Railw. Cas. 153.

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PART XI.

**THE LAW OF TAXATION AS AFFECTING
RAILWAYS.**

PART XI.

THE LAW OF TAXATION AS AFFECTING
RAILWAYS.

*CHAPTER XXXI.

TAXATION.

SECTION I.

Assessments on Railway Works, and on Stock or Shares.

- | | |
|---|---|
| 1, 2. Under English statutes company assessed for net earnings in each parish. | 8. Erections necessary to the use of a railway are not taxable apart from the road. |
| 3. Depreciation of road by time to be taken into account. | 9. But erections indispensable only to the making of profit, may be. |
| 4. Mode of estimating yearly net profits. | 10. So may such as are without the limits of land allowed to be taken compulsorily. |
| 5. Rule in several of the American states.
a. (b). Powers of the states as affected by the federal constitution. | 11. Capital given as a bonus taxable where capital in general is. |
| 6. Liability to taxation on railway stock same as on other personal property.
a. (e). Liability of foreign holders of railway bonds. | 12. Municipalities may tax abutting real estate for improvements. |
| 7. Railways generally not liable to taxation under the general law as a fixture. | 13, 14. Generally called taxation, not eminent domain. |

§ 228. 1. THE assessment of railways, in England, to the poor-rate, which is the chief parish rate there, is made upon the company, as an occupier of land, under the 43 Eliz. c. 2, which, by 6 & 7 Will. IV. c. 96, is required to be assessed upon the "net annual value."¹ And by 3 & 4 Vict. c. 89, re-enacted from time

¹ But the mere possession of running powers over a railway does not render the company having such powers liable to pay rates on the line to the parish in which it is situated. *Regina v. Midland Railway Co.*, 13 W. R. 202; a. c. 11 Law T. N. S. 303.

to time, the assessment is required to be "in respect of his ability, derived from the profits" of such occupancy of land, or other property. Under these statutes it was held, that a railway company was to be rated according to the value of the land, as increased by the line of railway and buildings.² And also that the company were properly assessed for what a lessee could afford to pay for the use of the railway, as net profits, after deducting all * expenses of maintaining its operation.³ And further, that such amount was to be distributed among the assessments of the several parishes, not in proportion to the length of the railway, but the actual earnings of each parish.⁴

² *Regina v. Glamorganshire Canal Co.*, 3 Ellis & E. 186.

³ Real property, which is at the time wholly unproductive and incapable of being used productively, has no annual value. *Attorney-General v. Sefton*, 2 H. & C. 362. And a mill which is not worked on account of a depression in the cotton trade is to be rated at its annual value only as a storehouse for the machinery in it. *Staley v. Castleton*, 5 B. & S. 505.

⁴ *Regina v. London & Southwestern Railway Co.*, 2 Railw. Cas. 629; s. c. 1 Q. B. 558; *Regina v. Stockton & Darlington Railway Co.*, 8 Law T. N. s. 422. And where certain lands had by the statute been excepted from liability to rate under the act, and afterwards part of the grounds so exempted was occupied by a railway company for the purposes of their road, it was held that such part was still exempt from the rate. *Todd v. London & Southwestern Railway Co.*, 7 M. & G. 366. Where the Sessions had assessed a railway, not according to its value as used for a railway, but according to the value of the adjoining lands, which was greater, the order was quashed, although it appeared that the railway had displaced many buildings which had contributed largely to the rates. *Regina v. Manchester, South Junction, & Altrincham Railway Co.*, 15 Q. B. 395, note. See *Waterloo Bridge Co. v. Cull*, 1 Ellis & E. 218; 5 Jur. N. s. 464; s. c. 1 Ellis & E. 245; 5 Jur. N. s. 1288. By statute 21 & 22 Vict. c. 98, § 55, the occupier of any land covered with water, or used only as a railway constructed under the powers of any act of Parliament for public conveyance, is to be assessed to the district rate at one fourth only of its net annual value, as ascertained at the last poor-rate. Under this provision it was held that a wet-dock was land covered with water; and that a railway which had been constructed by a company in connection with its docks, and joining a public railway and canal, under the powers of its private act, by which the company was bound to complete the railway for the accommodation of the public on payment of tolls, was a railway within the statute, although it was not constructed to carry passengers. *Regina v. Newport Dock Co.*, 31 Law J. Mat. Cas. 266; *Newport Dock Co. v. Newport Board of Health*, 2 B. & S. 708; *Midland Railway Co. v. Birmingham*, 13 Law T. N. s. 404.

Where by agreement between two railway companies forming together a continuous line it was stipulated that each should be at liberty to convey such

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2. And it makes no difference that some portion of the earnings of one parish may be received at other points.⁵ It is not what * is received in each parish, but what is earned there, which may be increased by there being more traffic there, or by the yearly outgoings and expense there being less.⁶

3. The company have a right to have the depreciation of the road by time taken into the account, to lessen the assessment.⁷ And the cost of any particular portion of the road is not to be taken into the account in determining the assessment except so far as it may conduce to the net earnings of that portion of the railway.⁸

4. By the English practice the Quarter Sessions are the final tribunal to estimate the yearly net profits of property so rated. And in making the assessment of the net profits of a railway, it was held they proceeded correctly in taking the gross receipts of the company in respect to their own railway, and making the following deductions: (1) Interest on the capital invested in

of its passengers as had taken tickets for the entire distance over the line of the other, paying for each passenger a certain sum by way of toll, it was held that in estimating the gross receipts of one railway company in respect of portions of its line running through different parishes, the company was at liberty to deduct such sums as had been paid over to the other company in pursuance of this agreement. *Regina v. St. Pancras*, 3 B. & S. 810; s. c. 9 Jur. N. s. 1102.

⁵ *Regina v. Holme Reservoir*, 10 W. R. 734. See also *Great Eastern Railway Co. v. Haughley*, Law Rep. 1 Q. B. 666.

⁶ *Hodges Railw.* 687; *Rex v. Barnes*, 1 B. & Ad. 113; *Rex v. Kingswinford*, 7 B. & C. 236. The assessment for the stations and buildings is a separate assessment for the net rent of such buildings. See also *London & Northwestern Railway Co. v. Cannock*, 9 Law T. N. s. 325; *Regina v. Stockton & Darlington Railway Co.*, 8 Law T. N. s. 422. The person receiving the money is the one to pay the tax on money received by railways for passenger traffic, under statute 5 & 6 Vict. c. 79. Where trains were required to be run at a fare of a penny a mile, under the approval of the Board of Trade, and such fares were exempt from taxation, it was held that the exemption would not attach if the trains were run at the same rate, but without the approval of the Board of Trade. *Great Western Railway Co. v. Attorney-General*, Law Rep. 1 H. L. 1.

⁷ *Regina v. London, Brighton, & South Coast Railway Co.*, 6 Railw. Cas. 440; s. c. 15 Q. B. 313; 3 Eng. L. & Eq. 329.

⁸ *Regina v. Mile End Old Town*, 10 Q. B. 208. The proper allowance for tenant's profits and interest on profits is entirely a question of fact. *Sheffield United Gas Light Co. v. Sheffield*, 4 B. & S. 135.

the movable stock of the company. (2) A percentage on the same capital, for tenant's profits and profits of trade. (3) A percentage on the same sum, for annual depreciation of stock, beyond ordinary annual repairs. (4) The actual annual expenses of the company. (5) The fair annual value of stations and buildings, rated separately from the railway. (6) An annual sum per mile, for the renewal and reproduction * of the rails, sleepers, &c., and that these were all the deductions properly to be made.⁹ (a)

* *Regina v. Grand Junction Railway Co.*, 4 Q. B. 18; *Regina v. Great Western Railway Co.*, 6 Q. B. 179; *Same v. Same*, 15 Q. B. 1085. In *Regina v. Holme Reservoir*, 10 W. R. 734, a company under an act of Parliament constructed a reservoir to supply water to mills on certain streams. They were authorized to raise money on the security of rates to be levied on the occupiers of such mills in proportion to the falls of water occupied by them. The rates to be levied were limited by the act, and were appropriated: first, to the current and ordinary annual expenses of the works not exceeding a certain sum; secondly, to maintaining the reservoirs; then, to paying the interest on sums borrowed under that and a former act; next, in setting apart a certain amount for a reserve fund; next, in paying incidental current expenses not covered by the sum first appropriated; and, lastly, in adding the surplus to a reserve fund. All the funds received were exhausted under the first three heads of appropriations. The water flowed from the reservoir into the natural course of the streams supplying the mills, nothing further having to be done to it by the company after it had left the reservoir. Some of the falls, in respect of which rates were payable, were situated within and some without the parish. It was held that the company had a beneficial occupation of the reservoir, in respect of which it was liable to be rated, and that in determining the ratable value it was not entitled to deduct the amount paid for interest on money borrowed; that the property was not exempted from rates by reason of the appropriation of its revenues; and that the sums received on account of falls situate without the parish should be taken into account as well as others. See also *Regina v. Tyne Improvement Commissioners*, 6 Law T. N. S. 489; *Sheffield United Gas Light Co. v. Sheffield*, 4 B. & S. 135; s. c.

(a) A railway company is entitled to a deduction from the ratable value in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, which is the measure of the assessment; and such deduction is not provided for by a deduction under the head of "working expenses." Nor is the company disentitled to such de-

duction because it has not incurred the expense, nor laid by from its receipts any sum to meet it when it should arise, although it ought to set apart the sum which it claims to deduct; and whenever the time comes for actually making the restoration, it will be estopped from claiming more than that deduction. *Regina v. London, Brighton, & South Coast Railway Co.*, Law Rep. 15 Q. B. 313.

(7) But where one railway company, by contract with another company, were to have the control of the trains and fares on the latter line, and were to pay a sum of money, which should raise their dividends upon their capital stock to three per cent, it was held that the payment made by the former company should not be *taken into the account in estimating the ratable value of the latter company.¹⁰ (8) But a rent, or sum in the nature of rent, paid for the occupation of a railway, is not necessarily a criterion of its ratable value. The profits on a main line, derived by occupation of a branch, may be taken into account in estimating the ratable value of the branch, and the local profits only.¹¹

5. In many of the American states railways are made liable to taxation as a part of the realty, including their whole line of road.¹² But this is defined in the several statutes, and the deci-

9 Jur. N. S. 623; *Eastern Counties Railway Co. v. Great Amwell*, 11 W. R. 394; s. c. *nom. Regina v. Eastern Counties Railway Co.*, B. & S. 58; s. c. 9 Jur. N. S. 1339. In the last case it was held that "terminal charges" or deductions from the charges for carrying goods set apart as the earnings of the staff and appliances at the station where the goods are delivered, are to be considered as part of the general earnings of the line, and not of the stations, and must be included in calculating the gross earnings and expenses of the line in a parish, for the purpose of assessing the railway for the relief of the poor in such parish. Where a branch railway is worked in connection with the whole line as an undistinguished part of it, the whole should be estimated together, and not the branch separately. *Regina v. Midland Railway Co.*, 15 Q. B. 313; s. c. 6 Railw. Cas. 464-477. And see *London & Northwestern Railway Co. v. Cannock*, 9 Law T. N. S. 325; *Great Eastern Railway Co. v. Haughley*, Law Rep. 1 Q. B. 666; s. c. 12 Jur. N. S. 596.

¹⁰ *Regina v. Newmarket Railway Co.*, 3 Ellis & B. 94; s. c. 25 Eng. L. & Eq. 138. But in *Regina v. Sherard*, 33 Law J. M. C. 5, it was held that the sum paid by one railway company to another for the use of a part of its station must be taken into account in estimating the ratable profits of the latter company.

¹¹ *Regina v. Southeastern Railway Co.*, 25 Eng. L. & Eq. 176. See also *Hodges Railw.* 686-737, where some valuable suggestions are found in regard to the detail of these assessments, which we have not space to repeat here. And see *State v. Illinois Central Railroad Co.*, 27 Ill. 64.

¹² In Indiana it is held that a railway company should be taxed for its road as an entirety, including everything in any way used by the company in running or operating it. But the real estate owned by a railway company or held by it in trust, and not used in running or operating the road, should be taxed in the same manner as that owned by a private individual. *Toledo & Wabash Railroad Co. v. Lafayette*, 22 Ind. 262; *Indianapolis, Cincinnati, & Lafayette*

sions will be of little force out of the state where made. But a brief reference to some of the more prominent points is here made. (*b*)

Railroad Co. v. Kilner, 69 Ind. 71. And see *Whitney v. Madison*, 23 Ind. 331. See also *Delaware & Hudson Canal Co. v. Commonwealth*, 43 Penn. St. 227.

(*b*) The power of the states is in this matter unlimited. Where the subject of taxation is within the jurisdiction, the extent of the tax and the mode of taxing are under exclusive state control. *McCulloch v. Maryland*, 4 Wheat. 428; *Providence Bank v. Billings*, 4 Pet. 563; *St. Louis v. Wiggins Ferry Co.*, 11 Wal. 423; *Cleveland, Painesville, & Ashtabula Railroad Co. (State Tax on Foreign-held Bond Case)*, 15 Wal. 300; *Delaware Railroad Tax*, 18 Wal. 206; *Taylor v. Secor (State Railroad Tax Case)*, 92 U. S. 575; *Kirtland v. Hotchkiss*, 100 U. S. 491. But this, of course, only when no provision of the federal constitution is infringed. Thus, the power may not be so exercised as to embarrass or restrict interstate commerce. *Reading Railroad Co. v. Pennsylvania (State Freight Tax Case)*, 15 Wal. 292; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. And see *infra*, § 233 (*b*). A tax, however, which only impedes interstate transit, as taxation always increases the expenses attendant on the use or possession of the thing taxed, may be valid. *Minot v. Philadelphia, Wilmington, & Baltimore Railroad Co. (Delaware Railroad Tax)*, 18 Wal. 206. A question of some difficulty sometimes arises as to whether the subject of taxation is within the jurisdiction, especially where the subject consists of stock or bonds, and the decisions do not seem to be in complete accord. In *Northern Central Railway Co. v. Jackson*, 7 Wal. 262, it was held, two judges dissent-

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ing, that a state could not authorize the deduction of a tax from interest on bonds issued by a company, part of whose road lay in another state, in which the company had been incorporated, the bonds being secured by mortgage of the entire road, for that such a tax amounted to a tax on property out of the jurisdiction. And see for other decisions, *infra*, note (*c*).

As to what is taxable property within the jurisdiction, the decisions are various under the different statutes of the several states. In some of the states the franchise of a railroad corporation is property, and assessable for taxation independently of the tangible property of the corporation. So in North Carolina. *Wilmington, Columbia, & Augusta Railroad Co. v. Brunswick County Commissioners*, 72 N. C. 10; *Richmond & Danville Railroad Co. v. Brogden*, 74 N. C. 707. And see *Atlantic, Tennessee, & Ohio Railroad Co. v. Mecklenburg*, 87 N. C. 129. So also in Maine. *State v. Maine Central Railroad Co.*, 74 Me. 376.

The states in the exercise of their plenary power to tax are not restricted to an ordinary tax upon capital stock or tangible property, but may tax income. *Delaware Railroad Tax*, 18 Wal. 206. Or gross earnings or receipts. *State v. St. Paul, Minneapolis, & Manitoba Railway Co.*, 30 Minn. 311; *Commonwealth v. Buffalo & Erie Railway Co.*, 2 Pearson, 376; *State v. Wilmington & Baltimore Railroad Co.*, 45 Md. 361. Or the right to operate a road within the state. *State v. McFetridge*, 56 Wis.

In New York, taxes are levied upon the value of the land and the erections and fixtures thereon, irrespective of the considerations whether the road is well or ill managed, or whether it is profitable to the stockholders or otherwise.¹³

* The rule in Illinois seems to be much the same. The railway is held liable to taxation as real estate, situated within the county

¹³ Albany & Schenectady Railroad Co. v. Osborn, 12 Barb. 223; Albany & West Stockbridge Railroad Co. v. Canaan, 16 Barb. 244. Each tax district assesses that portion of the road within its jurisdiction. People v. Niagara Supervisors, 4 Hill, 20. In regard to taxation of railways, it has been well said that the only just basis for exercising it is that it be imposed upon profits. Paine v. Wright, 6 McLean, 395. See also People v. Brooklyn, 6 Barb. 209.

By a statute of New York, passed in 1857, the real estate of railway corporations is assessed "in the town or ward in which the same shall lie, in the same manner as the real estate of individuals." And assessments on the personal estate of railways shall be made by the assessors of the "town or ward in which their principal office is situated," but the taxes thereon "shall be divided and paid . . . to the collectors of the several towns, &c., through which the road shall pass, in proportion, as near as may be, to the length of the track in such towns, &c., as compared with the whole length." This seems to be putting assessments upon the real estate of railway companies very much on the basis of the English practice, except that the distribution among the several towns of the assessment for personal estate is to be made according to the length of track in each town; while in England the assessment on real estate includes the plant, or rolling stock of the road, as a mere accessory to the profits, by which the road-bed and superstructure are rated. This seems more simple and just than to attempt a separate estimate of each, and the more recent decisions in this country certainly incline in that direction. *Infra*, § 235, notes 21, 22, 23, 24.

256. Or they may levy a tax of so much for each passenger carried from one place to another within the state. Clarke v. Philadelphia, Wilmington, & Baltimore Railroad Co., 4 Houst. Del. 158. But not for passengers carried into or out of the state, as that would be in effect a regulation of commerce, and invalid under that provision of the federal constitution which has been already referred to, but is more fully considered in a subsequent section. *Ib.* See Gloucester Ferry Co. v. Pennsylvania, *supra*, and Reading Railroad Co. v. Pennsylvania, *supra*; and see *infra*, § 233 (b).

This power to tax, however, is not in the states alone. There is also a concurrent power for some purposes in the federal government, — a power which was exercised in the passage of the internal revenue acts of 1862, 1864, and 1867, taxing income, &c. See 12 Sta. at Large, 469, 13 Id. 223, 14 Id. 477. And see Western Union Railroad Co. v. United States, 101 U. S. 543; United States v. Erie Railway Co., 106 U. S. 327, and cases *passim* in the reports of the decisions of the United States Supreme Court.

assessing the tax,¹⁴ (c) and a tax upon an undivided portion of a * railway lying in different counties, including its furniture, is not

¹⁴ *Sangamon & Morgan Railroad Co. v. Morgan County*, 14 Ill. 163; *State v. Illinois Central Railroad Co.*, 27 Ill. 64; *Mohawk & Hudson Railroad Co. v. Clute*, 4 Paige, 384. It has been held, that where the right to maintain actions in a county depends on residence, the company may maintain an action in that county where their records were kept and a large share of their business transacted, although it might have another office in a different county where the residue of its business was done, and where the clerk and treasurer resided. *Androsoggin & Kennebec Railroad Co. v. Stevens*, 28 Me. 434; *Bristol v. Chicago & Aurora Railroad Co.*, 15 Ill. 436. See also *Rhodes v. Salem Turnpike & Chelsea Bridge Co.*, 98 Mass. 95.

In *Connecticut & Passumpsic Rivers Railroad Co. v. Cooper*, 30 Vt. 476, the question of the plaintiff's right to maintain an action on the ground of residence in a certain county into which its road extended, but where it had no office or place of business except its ordinary way stations, was discussed at length, and it was held that a railway company, for purposes of maintaining actions or being taxed for personalty, in the place of residence, must be regarded as having its *situs* at some point on its line (including branches); and that this could not ordinarily be extended beyond the place of its principal business office, at the point where its chief operations, under its charter, had their centre; that this could not in any view be extended to include merely way stations. This was maintained to be the only conclusion to be drawn from the decisions, and to have the support of convenience, analogy, and general acquiescence, both in legislation and in judicial construction. See *People v. Peirce*, 31 Barb. 138; *Southwestern Railroad Co. v. Paulk*, 24 Ga. 356. In *Garton v. Great Western Railway Co.*, Ellis, B. & E. 836, it was held, that although the railway held half-yearly meetings at two points, and elected half its board of directors from those resident near each place, yet, as all the general business of the company was transacted at one of the places, where the secretary resided and where orders were issued, that must be regarded as the only "principal office" of the company for the purpose of serving process under the English statute.

And in *Smith v. Exeter*, 37 N. H. 556, it was held, that if a railway corpo-

(c) The track and rolling stock are assessed by the state board of equalization, but all other real estate of railroad companies, including stations and structures, by the local assessors. *Chicago, Burlington, & Quincy Railroad Co. v. Paddock*, 75 Ill. 616; *Chicago, Burlington, & Quincy Railroad Co. v. Siders*, 88 Ill. 320. Double assessments must be avoided. *Chicago & Alton Railroad Co. v. People*, 99 Ill. 464. The Illinois statute regulating

the assessment of railroad property for taxation is reviewed in *Taylor v. Secor*, (State Railroad Tax Cases), 92 U. S. 575. In Missouri it is held that while rolling stock should, in general, be assessed and taxed at the residence of the corporation, it may be provided by statute that it shall be taxed in the various towns, counties, &c., through which the road passes, in proportion to the length of the road in the several places. *State v. Severance*, 55 Mo. 378.

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legal. The personal property of the corporation is liable to taxation, if at all, at the residence of the owner, which, in such case, is considered to be the place of their principal office of business.¹⁴

The same rule seems to obtain in Rhode Island.¹⁵

* In some of the states the capital stock of a corporation is taxable to the company in the town where it keeps its principal business office.¹⁶ (d)

* 6. But the owners of stock in railway companies are liable to taxation upon it, without reference to any tax imposed upon the company. (e) And upon this ground it was decided that the

ration is located in another state, and all its property is taxed in that state, to the corporation, on the same valuation and at the same rate as the property of an individual, a stockholder residing in the state is not liable to be taxed for his stock in the road. This point was not raised in the Pennsylvania cases cited *infra*, *McKeen v. Northampton County*, and *Whitesell v. Northampton County*, 49 Penn. St. 519, 526. And see *Conwell v. Connersville*, 15 Ind. 150.

¹⁴ *Providence & Worcester Railroad Co. v. Wright*, 2 R. I. 459. See also *Louisville & Portland Canal Co. v. Commonwealth*, 7 B. Monr. 160.

¹⁶ *Mohawk & Hudson Railroad Co. v. Clute*, 4 Paige, 384. Where a question arises in which of two or more jurisdictions a party is taxable, he will be allowed to maintain a bill of interpleader to determine the question. *Thompson v. Ebbets*, *Hopkins*, 272. See also *Utica Bank v. Utica*, 4 Paige, 399. The dividends of passenger railway companies are liable to city taxes. *Railroad Co. v. Philadelphia*, 49 Penn. St. 251. And in *Conwell v. Connersville*, 15 Ind. 150, it was held that a corporation can be taxed in the place where such corporation is located, only on its corporate property, as distinguished from the interests of the several stockholders, which were taxable in those places where they respectively resided. And see *McKeen v. Northampton County*, 49 Penn. St. 519; *Whitesell v. Same*, 49 Penn. St. 526.

(d) And a certificate of incorporation which, under the statute, specifies the place where the principal office is to be located, is conclusive for purposes of taxation. *Pelton v. Northern Transportation Co.*, 37 Ohio St. 450.

(e) And liable, it seems, though non-residents. In *Michigan Central Railroad Co. v. Slack*, 100 U. S. 595, it was held that the internal revenue act was valid, although it taxed debts due by way of interest from corporations to alien non-resident shareholders, and directed the withholding from such

shareholders of the amount of the tax, and the rule was adhered to in *United States v. Erie Railway Co.*, 106 U. S. 327, *FIELD, J.*, dissenting. And see *Baltimore v. Baltimore Railroad Co.*, 57 Md. 31. The rule as to the taxation of foreign-held bonds does not seem to be perfectly settled. The decisions are both ways. In *Cleveland, Painesville, & Ashtabula Railroad Co. v. Pennsylvania* (State Tax on Foreign-held Bond Case), 15 Wal. 300, it was held by a divided court that a statute assuming to tax bonds issued by

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company were not liable to taxation upon the track, or stations, unless specially so provided by statute, because this would be virtually double taxation.¹⁷ The owner of stock is liable to taxation, whether the corporation be in the state of his residence or not, and even where it is taxed in another state.¹⁸ And where one * becomes himself the lessee of the works of a company, and is liable to taxation upon its property, in the place of his residence, he is also liable to be taxed, in the same place, for the stock he owns in the same company.¹⁹ Where a railway is required to pay

¹⁷ Bangor & Piscataqua Railroad Co. v. Harris, 21 Me. 533. But in Cumberland Marine Railroad Co. v. Portland, 37 Me. 444, this case is said to have been decided contrary to Rev. Stat. 1838, which expressly makes "improved lands taxable," *sed quære*. And in other states it is held, that by parity of reason the state may lawfully tax both the stock and the road, as a fixture, or tax one when the other is exempt. But see cases under note 5, which seem to take a different view. Illinois Central Railroad Co. v. McLean County, 17 Ill. 291; Philadelphia, Wilmington, & Baltimore Railroad Co. v. Bayless, 2 Gill, 355. In McKeen v. Northampton County, 49 Penn. St. 519, it is held, that the taxing power, resting on the mutual duties between state and citizen of protection and support, and extending over all the persons lawfully within the territory, and all the property that either followed such persons or fell locally within the territorial limits of the state, was rightfully exercised over manufacturing stock owned by a citizen of Pennsylvania, though the corporation was a foreign one. And see also Whitesell v. Northampton County, 49 Penn. St. 526; Corwell v. Connersville, 15 Ind. 150; Worthington v. Hamilton County Treasurer, 25 Ohio St. 1.

¹⁸ State v. Branin, 3 Zab. 484; Easton Bridge v. Northampton, 9 Penn. St. 415; State v. Bentley, 3 Zab. 532; State v. Danser, 3 Zab. 552; Great Barrington v. Berkshire County, 16 Pick. 572. But see Gordon v. Baltimore, 5 Gill, 231, and 12 Gill & J. 117. And in such cases the value of the real estate of the corporation is not to be deducted, in estimating the value of the stock for which the owner is taxable in the place of his residence. Dwight v. Boston, 12 Allen, 316.

¹⁹ Stein v. Mobile, 24 Ala. 591; Providence Bank v. Billings, 4 Pet. 514;

a home corporation, but held by a non-resident, by directing the corporation to withhold a percentage of the interest thereon and pay the same to the state, was invalid as impairing the obligation of the contract between the corporation and the bondholder. The right of the state to tax bonds held by a non-resident is denied also by Commonwealth v. Chesapeake & Ohio

Railroad Co., 27 Grat. 344. But *contra*, Maltby v. Reading & Columbia Railroad Co., 52 Penn. St. 140. And *contra*, also the decisions of the courts of Maryland. Appeal Tax Court v. Patterson, 50 Md. 354; Appeal Tax Court v. Gill, 50 Md. 377; Baltimore v. Baltimore City Passenger Railway Co., 57 Md. 31.

into the state treasury a certain sum annually, from its "income," this is to be understood as its net income of that year, and where in any year the net income is not sufficient to pay that sum, the company are not obliged to make up the deficiency from the excess of other years.²⁰

7. Under the general laws of different states, by which real estate is made liable to taxation, railways have not generally been held liable to taxation as a fixture, their stock being liable in the hands of the shareholders. But there are some exceptions to this practice. It has been held,²¹ that it is competent for the legislature, by general law, to require all corporations organized in the state to pay the state treasurer a tax upon the market value of their capital stock, above the value of their real estate and machinery taxable in the towns or cities where located. But such tax of the corporation will not exempt the shareholders from taxation on the amount of stock owned by them, as personal property held and owned by themselves personally.²² A street railway corporation is not taxable, either upon general principles or under the Massachusetts statute, for horses and other personal property owned and used in the prosecution of its business, such property representing the capital of the corporation.²³

8. In Pennsylvania, in *Lehigh Navigation Co. v. Northampton * County*,²⁴ it was held, that the toll-houses and offices of a canal company are such a necessary incident of the corporation and its functions, that they cannot be assessed and taxed as separate real estate. And in a later case,²⁵ it was held, that such property as is

State v. Tunis, 3 Zab. 546. In this case it was held, that the shareholder is liable to taxation on his shares, according to their fair market value, and not at the nominal par value.

²⁰ Opinion of the Judges, *In re Western Railroad Co.*, 5 Met. 596.

²¹ *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75; *Same v. Hamilton Manufacturing Co.*, 12 Allen, 298.

²² *Bridgeport v. Bishop*, 33 Conn. 187.

²³ *Middlesex Railroad Co. v. Charlestown*, 8 Allen, 330. A railway company is not taxable for the land embraced in its location, under Mass. Statutes, 1855, c. 240. *Charlestown v. Middlesex County*, 1 Allen, 199. So also wood, timber, logs, lumber, and other articles distributed along the line of a railway for immediate or constant use in the repair and operation of the road, form a portion of the road, and can be taxed only as the road is taxed. *Fitchburg Railroad Co. v. Prescott*, 47 N. H. 62.

²⁴ 8 Watts & S. 334.

²⁵ *Railroad Co. v. Berks County*, 6 Penn. St. 70; s. c. 2 Am. Railw. Cas. 306.

appurtenant and indispensable to the construction and operation of a railway, as water-stations and depots, and probably offices, and oil-houses, and car and engine houses, and all such erections as may fairly be regarded as necessary to the convenient use of the road, are to be held exempt from taxation, as forming a part of the incorporeal estate of the corporation.²⁶

9. But it was also said in this last case,²⁷ that those erections which are only indispensable to the making of profits, such as warehouses, coal-lots, coal-shutes, machine-shops, wood-yards, and what does not form part of the road, are liable to taxation.

10. In a case in Vermont²⁸ it was held, that where the charter of a railway exempted its property perpetually from taxation, this did not extend to lands and tenements which the company had acquired for convenience, and which were without the limits of the six rods, which, by their charter, they were allowed to take compulsorily, and which were in the occupancy of tenants or employés of the company.²⁹

11. Where a railway company by the express provisions of its charter is liable to a defined tax upon all its capital paid in, and upon all its loans for the purpose of constructing the road, it was held that \$300,000 of the capital stock, which was given as a bonus * to the original purchasers of the road of the state, \$183,000 discount or loss on the sale of the bonds of the company, and near half a million dollars of the bonds of the company exchanged for the bonds of another company, but which had never been used by the company, were all liable to taxation. The first, as forming a portion of the capital stock of the company, and on the ground that it made no difference that the money had never been actually

²⁶ See *Carbon Iron Co. v. Carbon County*, 39 Penn. St. 251.

²⁷ *Railroad Co. v. Berks County*, *supra*.

²⁸ *Vermont Central Railroad Co. v. Burlington*, 28 Vt. 193.

²⁹ And in *Carbon Iron Co. v. Carbon County*, 39 Penn. St. 251, it was held that corporations are not exempt from taxation as such, but only the public works held by them as public works, with the necessary appurtenances. Lands held by corporations for private purposes are taxable as the lands of individuals are, unless expressly exempt. The tax for state purposes payable at the auditor-general's office, is a tax on the corporate franchises, and is not intended as an exemption from ordinary taxation. *Ib.* In *Jefferson Branch Bank v. Skelly*, 1 Black, 436, it is held that a state is not to be deemed to have abridged or surrendered the right of taxation of a corporation, unless such abridgment or surrender is expressed in the charter in terms too clear for mistake.

paid in, since the shares had been given out upon consideration, and were thus beyond the control of the company, and entitled to the profits of the company as such, like any other portion of the capital stock. The second, upon the ground that the bonds issued showed the amount of the loan. The third, upon the ground that such an exchange of bonds must be considered as a loan to the company.⁸⁰

12. The power of municipal corporations to make special assessments upon abutters, for the purpose of improving the streets, where such estates are peculiarly and specially benefited, and where the burden is professedly apportioned according to benefit, is most unquestionable.⁸¹

13. This question has been a good deal discussed in the different states within the last few years. The principal point of difference has been to determine where taxation ends and the tenure by the right of eminent domain begins. Since the decision of the case of *People v. Mayor of Brooklyn*,⁸² the courts seem very composedly to have sunk down into the quiet conviction that it is all nothing but taxation, and that where the municipal authorities assess the land to its full value for the purpose of assumed improvements, more or less remote from the land, and without regard to the extent of the ratio of equalization, it is still nothing but taxation.⁸³

14. The question is very carefully considered by SAWYER, J., in the last case, and the authorities carefully collected and arranged. As the full discussion of the question hardly comports with our plan, we must content ourselves with a mere reference to some of the leading cases upon this point.⁸⁴

⁸⁰ *People v. Michigan Southern & Northern Indiana Railroad Co.*, 4 Mich. 398.

⁸¹ *Hill v. Higdon*, 5 Ohio St. 243.

⁸² 4 N. Y. 420.

⁸³ *Emery v. San Francisco Gas Co.*, 28 Cal. 345, and cases cited.

⁸⁴ The doctrine above stated is more or less directly affirmed in *Brewster v. Syracuse*, 19 N. Y. 116, 118; *Northern Indiana Railroad Co. v. Connelly*, 10 Ohio St. 159; *Municipality No. 2 v. White*, 9 La. An. 452; *Baltimore v. Green Mount Cemetery Co.*, 7 Md. 536; *Nichols v. Bridgeport*, 23 Conn. 206; *State v. Newark*, 3 Dutcher, 191. And in *Dorgan v. Boston*, 12 Allen, 223, the court seem to have considered that an express constitutional provision that all taxes and assessments shall be equal and proportional, will not operate to limit the power of the legislature in regard to assessments of this character.

One state cannot impose a tax *in solido* on the interest accruing on bonds

*SECTION II.

Legislative Exemption from Taxation.

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| <ol style="list-style-type: none"> 1. Nature and grounds of such exemption.
n. (a) Power of states to grant exemption. 2. General exemption from taxation includes stock. 3. But not property, a mere convenience in transaction of business. 4. Exemption of the capital stock includes all property necessary to carrying on of business. 5. Exemption, with exception, exempts from taxation in all modes but the one excepted. 6. Union of companies where some are exempt from taxation and some not. 7. Construction of a qualified exemption from taxation. 8. Decision holding perpetual exemptions unconstitutional. | <ol style="list-style-type: none"> 9. Railway works taxed indirectly cannot be taxed directly also. 10. Qualified exemptions held valid and inviolable. 11. Exemptions from taxation should be held temporary, where they will bear that construction. 12. Land taken by right of eminent domain for certain public uses exempt. 13. Distinction between public and private business corporations. 14. Distinction between structures within and structures without the road-grant clearly invalid. 15. Public corporations, as to property used for public purposes, exempt from taxation. 16. Taxation of foreign or interstate commerce prohibited. |
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§ 229. 1. The grounds of exemption from taxation in regard to property seem to be of two kinds, more or less identical, perhaps, *in principle. First, where property is conveyed directly by the state, upon the express condition that it shall be forever afterwards exempt from all taxation. In this case the exemption tends directly to enhance the price of the thing, and there is a most obvious equity in maintaining the perpetual obligation and inviolability of the condition. Of this character was the exemption claimed and sustained in the case of the State of New Jersey *v. Wilson*,¹ and distinctly recognized in many subsequent cases which more properly apply to other general divisions of the subject. Second, it is held in a considerable number of cases in the United States Supreme Court,² (a) that where a corporation is

secured by mortgage on an entire railway, a portion of which lies in another state. *Railroad Co. v. Jackson*, 7 Wal. 262.

¹ 7 Cranch, 164. See also *Fletcher v. Peck*, 6 Cranch, 87.

² 3 How. 133; 16 How. 386; id. 416; *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

(a) That the legislature of a state may exempt property of a corporation unrestrained by the state constitution from taxation is now well settled.

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chartered by the state legislature, not only its property but its capital in the hands of shareholders may by an express grant be perpetually exempted from taxation: (1) When a distinct bonus or price is paid to the state for the charter, including the exemption; and (2) even when no such specific price is paid, the exemption may be sustained upon the mere ground of the company assuming to perform certain public duties. This doctrine is distinctly held in *Gordon v. Appeal Tax Court*, and in *State Bank v. Knoop*, and in *Ohio Life Insurance Company v. Debolt*.² The cases in the several states where this rule is recognized are numerous; but as the binding force and inviolability of this exemption depends upon the applicability of that provision in the United States Constitution prohibiting the state legislatures from passing any law impairing the obligation of contracts, the only authoritative exposition of the subject must be sought in the ultimate decision of the national tribunals. For, unless we adopt

The principle is expressly affirmed in several cases in the federal courts, and also in the state courts, and assumed as one of the bases of decision in many more. It is expressly affirmed in *Tomlinson v. Branch*, 15 Wal. 460; *Louisville & Nashville Railroad Co. v. Gaines*, 3 Fed. Rep. 266; *Winona & St. Peter Railroad Co. v. Derrel County*, 7 Am. & Eng. Railw. Cas. 348.

It is equally well settled, whatever may be thought of the impolicy of such grants, that where the grant of exemption amounts to a contract, having the essential element of a consideration, the grant is protected by that provision of the federal constitution which forbids the states to impair the obligation of contracts, and is forever beyond the reach of future adverse legislative action. *Ohio State Bank v. Knoop*, 16 How. 369; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Wilmington & Raleigh Railroad Co. v. Reid*, 13 Wal. 264.

But such a contract is not to be

presumed. On the contrary, every reasonable doubt should be resolved against it. *Providence Bank v. Billings*, 4 Pet. 514; *Philadelphia & Wilmington Railroad Co. v. Maryland*, 10 How. 376. *Tucker v. Ferguson*, 22 Wal. 527; *Hoge v. Richmond & Danville Railroad Co.*, 99 U. S. 348; *Baton Rouge Railroad Co. v. Kirkland*, 33 La. An. 622; *Anne Arundel County Commissioners v. Annapolis Railroad Co.*, 47 Md. 592; *Scotland County v. Missouri, Iowa, & Nebraska Railway Co.*, 65 Mo. 123, and cases *passim*. And see *infra* § 231, where such contracts are more fully considered. And municipal corporations have no power to make such contracts. *New Orleans v. St. Charles Street Railroad Co.*, 28 La. An. 497; *Missouri v. Hannibal & St. Joseph Railroad Co.*, 75 Mo. 208.

And, it seems, also beyond the reach of a subsequent constitutional provision that "no property shall be exempt from taxation," &c. *Scotland County v. Missouri, Iowa, & Nebraska Railway Co.*, 65 Mo. 123.

this view, there is of course no path open to anything approaching uniformity of decision upon a subject of such vital importance. We shall, therefore, only refer to such decisions of the state courts as propose to limit or qualify the doctrine.

2. The cases in the United States Supreme Court regard a general exemption of the property of a corporation from taxation as exempting its stock in the hands of the stockholders.³ (b)

3. But some of the state courts have construed such general exemption as not extending to property of the corporation, which * was a mere convenience in the conduct of their business, but not essential.⁴ (c) And it has been held in some cases that a general

³ *Gordon v. Appeal Tax Court*, 3 How. 133. It also embraces the franchise of the corporation, and the provision is not subject to the control of future legislatures. *Wilmington Railroad Co. v. Reid*, 13 Wal. 264. And an exemption from taxation for a term of years is held equally valid. *Raleigh & Gaston Railroad Co. v. Reid*, 13 Wal. 269.

⁴ *State v. Mansfield*, 3 N. J. 510; *Gardner v. State*, 1 N. J. 557; *Worcester v. Western Railroad Co.*, 4 Met. 564; *Meeting-House Society v. Lowell*, 1 Met. 538; *Lehigh Coal & Navigation Co. v. Northampton County*, 8 Watts & S. 334; *Rome Railroad Co. v. Rome*, 14 Ga. 275; *Railroad Co. v. Berks Co.*, 6 Penn. St. 70; *Carbon Iron Co. v. Carbon County*, 39 Penn. St. 251; *Lackawanna Iron Co. v. Luzerne County*, 42 Penn. St. 424. But see *Neustadt v. Illinois Central Railroad Co.*, 31 Ill. 484, where the principle of exemption is carried further than the state courts have generally been willing to extend it, though not probably further than the case required.

(b) It was held, however, in *Railroad Co. v. Gaines*, 97 U. S. 697, where the charter exempted the capital stock forever and the tangible property for twenty years, that the tangible property, though it represented capital, was taxable after expiration of the twenty years. And in *Commonwealth v. Danville, Hazelton, &c., Railroad Co.*, 2 Pearson, 400, it was held that an exemption of the property of the company was not an exemption of the stock, for that the stock was the property not of the company but of the shareholders. But see *infra*, pl. 4, and notes.

(c) Thus, elevators erected by a railroad company for the storage of

grain, are not exempt from taxation as railroad property, such companies being under no obligation as common carriers to furnish storage for grain transported after their relation thereto as carriers has ceased. *Milwaukee & St. Paul Railway Co. v. Milwaukee*, 34 Wis. 271. Nor are dwelling-houses owned by the company exempt. *Milwaukee & St. Paul Railway Co. v. Milwaukee*, 34 Wis. 271. Nor are hotels for summer resort. *State v. Baltimore & Ohio Railroad Co.*, 48 Md. 49. Nor are steamboats, owned and used by the company. *Illinois Central Railroad Co. v. Irvin*, 72 Ill. 452. But when the company is by its charter empowered to own, and

exemption of a railway from taxation does not extend to the holder of their bonds.⁵ And where a corporation is made liable to a specific tax whenever their net profits shall reach a certain point, and exempted from all other taxes, this is a present exemption from all other modes of taxation except that specified, and that only attaches when the condition occurs.⁶ A general exemption of the property of a corporation from taxation, but making the stock liable to taxation in the hands of stockholders, will exempt its surplus funds and its real estate from taxation.⁷

4. Exemption of the capital stock has been held to exempt property of the company necessary to carry on the business.⁸ (d)

5. In *State v. Berry*,⁹ it is held that where the charter of a railway was subjected in terms to certain specified taxation, with a general exemption "from all further or other tax or imposts," that this exempted the company perpetually from all other taxation; and this is the doctrine laid down by the majority of the United States Supreme Court, in *State Bank v. Knoop*.¹⁰

6. And where a corporation enjoying an exemption from taxation is united with other corporations not having such exemption by a legislative act of consolidation, this does not extend the

⁵ *State v. Branin*, 3 Zab. 484. A statute or charter of a railway exempting its stock from taxation, extends to its gross income. *State v. Hood*, 15 Rich. 177. But see *State v. Ross*, 3 Zab. 517. The exemption named in the text, and all others, may be repealed by the legislature, under the general reservation of the right to alter or amend the charter of the corporation. *Morris & Essex Railroad Co. v. Miller*, 2 Vroom, 521; *Jersey City & Bergen Railroad Co. v. Jersey City*, id. 575.

⁶ *State v. Minton*, 3 Zab. 529.

⁷ *State v. Tunis*, 3 Zab. 546.

⁸ *Rome Railroad Co. v. Rome*, 14 Ga. 275.

⁹ 2 Harrison, 80; *New York & Erie Railway Co. v. Sabin*, 26 Penn. St. 242, where the exemption is implied from the company being subjected to taxes in a specific mode. And the same point is maintained in the subsequent case of *Iron City Bank v. Pittsburg*, 37 Penn. St. 340.

¹⁰ 16 How. 386.

run boats in connection with its line, it seems that premises used by a steamboat company with which the railroad company makes a running and pooling arrangement may be exempt. *Osborn v. Hartford & New Haven Railroad Co.*, 40 Conn. 498.

(d) So held in *Scotland County v. Missouri, Iowa, & Nebraska Railway Co.*, 65 Mo. 123; for that the stock was but representative of the property. But see *supra*, note (b).

exemption beyond the first corporation; and the property of the other corporations, being the road of a railway, is still liable to taxation.¹¹ (e)

* 7. And where a statute provided that the shares of the capital stock of a certain railway should be exempt from taxation, "except that portion of the permanent and fixed works of the company within the state of Maryland," and that, in regard to that section, no greater tax should be at any time levied than in proportion to the general taxes throughout the state at the same time; it was held, that such portion of the fixed works of the company as was within the state of Maryland remained subject to general taxation for state and county taxes.¹²

8. In an important case, *Pennsylvania Canal Commissioners v. Pennsylvania Railroad Company*,¹³ where the cases are very

¹¹ *Philadelphia & Wilmington Railroad Co. v. Maryland*, 10 How. 376. See also *Baltimore v. Baltimore & Ohio Railroad Co.*, 6 Gill, 288.

¹² *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Bayless*, 2 Gill, 355.

¹³ 5 Am. Law Reg. 623. The cases chiefly relied on by the court, in this case, as having established a similar doctrine in other states, are those in Ohio, which were reversed by the United States Supreme Court. They are the following: *State Bank v. Knoop*, 16 How. 376; *Ohio Life Insurance Co. v. Debolt*, 16 How. 426; s. c. 1 Ohio St. 563. The same principle is maintained in *Toledo Bank v. Toledo*, 1 Ohio St. 623, and in *Mechanics' & Traders' Bank v. Debolt*, 1 Ohio St. 591; s. c. reversed in United States Supreme Court, 18 How. 380; *Same v. Thomas*, 18 How. 386; *Milan & Richland Plank-Road Co. v. Husted*, 3 Ohio St. 578; *Norwalk Plank-Road v. Same*, 3 Ohio St.

(e) Nor does a new corporation formed by the consolidation of existing corporations and vested with all the rights, &c., of either, acquire thereby any immunity from taxation greater than the original corporations severally had. Property subject to taxation before the corporation will remain subject. *Chesapeake & Ohio Railroad Co. v. Virginia*, 94 U. S. 718. And as to the effect of the consolidation of corporations upon existing exemptions, see *Railroad Co. v. Maine*, 96 U. S. 499; *Railroad Co. v. Georgia*, 98 U. S. 359; *Atlanta & Richmond Air Line Railroad Co. v. State*,

68 Ga. 483; *State v. Railroad Taxation Commissioner*, 37 N. J. Law, 240; *State Treasurer v. Auditor-General*, 3 Am. & Eng. Railw. Cas. 565; *State v. Northern Central Railway Co.*, 44 Md. 181. Nor does a corporation, by its charter exempt from all taxation other than taxation in a specified mode, lose its exemption from general taxation by consenting to a specified tax or a special mode of assessment. The original exemption is modified only to the extent agreed to. *State v. Railroad Taxation Commissioner*, 37 N. J. Law, 240.

extensively and thoroughly examined by LEWIS, C. J., the following propositions are maintained in the decision: (1) A state legislature, in the absence of any express constitutional authority, has no power to sell, surrender, alienate, or abridge any of the rights of sovereignty, such as the right of taxation, so as to bind future legislatures; and any contract to that effect is void. (2) So much of the act of the legislature of Pennsylvania authorizing the sale of the Main Line of the public improvements of that state, as provides, that if the Pennsylvania Railway Company shall become the purchaser, they shall pay, in addition to the purchase-money at which the Main Line may be struck down, the sum of \$1,500,000; in consideration whereof the said railway company and the Harrisburg Railway Company shall be discharged by the Commonwealth "*for ever* from the payment of all tonnage taxes, and all other taxes whatever," "except school, city, county, borough, and township taxes," is declared unconstitutional and void; and an injunction was granted to prevent the same forming part of the terms of the sale.

9. Where a railway in another state is allowed, by act of the *legislature, to build part of its road in the state of Pennsylvania, on condition of paying to the state a certain sum annually, and also a corporation tax on so much of its capital stock as should be equal to the cost of construction of that portion of the road and its appurtenances within the state, and the expense of machine-shops, foundries, passenger and freight houses, which were used to carry on the business of the company, had been charged to the cost of construction, it was held they were not subject to assessment and taxation for state and county purposes.¹⁴

586; *Dodge v. Woolsey*, 18 How. 331. See also *Southern Railroad Co. v. Jackson*, 38 Miss. 334, where it is held that legislative exemptions from taxation are temporary, unless forming part of the charter. But in *Home of the Friendless v. Rouse*, 8 Wal. 430, it was held that a legislative exemption from taxation of the property of a charitable corporation contemporaneous with the charter and forming one of its considerations, was beyond the control of future legislatures, three of the judges dissenting. *s. p.* *Washington University v. Rouse*, 8 Wal. 439. But a state law offering a premium of ten cents on every bushel of salt made from water obtained by boring within the state, and exemption from taxation of the land used for such purposes, is not an irrevocable contract, but a mere act of general legislation; and may be repealed, at the pleasure of the legislature, although carried into effect by parties relying on the encouragement of the act. *Salt Co. v. East Saginaw*, 13 Wal. 373.

¹⁴ *New York & Erie Railway Co. v. Sabin*, 26 Penn. St. 242. But the prin-
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10. In a case before the United States Circuit Court in Ohio, it is held, that a state law which declares "that a bank shall pay a tax of six per cent upon its dividends, after deducting accustomed expenses and losses, in lieu of all taxation whatever," is a contract the obligation of which the legislature cannot impair.¹⁵

11. It is unquestionable that the legislature may, in the charter of a corporation, fix the rate of taxation for the time being, and subsequently repeal the provision, and subject the company to a higher rate of taxation; and unless exclusive terms are used in regard to a provision limiting the rate of taxation, it will be regarded as temporary.¹⁶

12. There is one class of exemptions from taxation prevailing * in some of the states which operates rather unjustly in some cases and unequally in others. We refer to the exemption of such property from taxation as the legislature have appropriated to public use under the right of eminent domain. This will include town-houses, school-houses, and probably land and buildings

ciple of this case would seem to be questioned by the later case of *Lackawanna Iron Co. v. Luzerne County*, 42 Penn. St. 424, though the two decisions are not, strictly speaking, irreconcilable. It is here declared that the houses, lands, and other property of a corporation held for its private purposes, are not exempt from taxation because purchased with its capital stock, on which it is obliged to pay a tax to the Commonwealth, unless specially exempt in the charter. The court admit that the public works of a corporation, used as such, with their necessary appurtenances, are exempt from taxation; but declare that all its other property, real and personal, is liable to assessment and taxation for customary purposes, in the same manner as if held by individuals. *Lackawanna Iron Co. v. Luzerne County*, 42 Penn. St. 424.

¹⁵ *Woolsey v. Dodge*, 6 McLean, 142. This decision is based on those of the United States Supreme Court as of binding authority on all other tribunals in the republic. But the rule will not apply where the exemption from taxation is created in the charter of corporations subject to future amendments or repeal by the legislature. In such cases the legislature may repeal or modify the exemption from taxations. *Commonwealth v. Fayette County Railroad Co.*, 55 Penn. St. 452.

¹⁶ *Ohio Trust Co. v. Debolt*, 16 How. 416; *Easton Bank v. Commonwealth*, 10 Penn. St. 442; *Christ Church v. Philadelphia*, 24 How. 300. In *Eversfield v. Mid-Sussex Railway Co.*, 8 De G. & J. 286; s. c. 5 Jur. n. s. 776, it was held by the Lord Justices, in the Court of Chancery Appeal, that acts of Parliament authorizing the construction of public undertakings are to be construed strictly, with reference to the rights of those who are authorized to make them.

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appropriated to the use of supplying water to the inhabitants of towns and cities, and some others of a similar character.¹⁷

13. And the same rule has been extended to a private railway corporation ;¹⁸ but, as it seems to us, without sufficiently regarding the distinction, in this respect, between a public municipal corporation, all of whose objects and purposes are public and wholly detached from all considerations of profit or business, and a merely business corporation, whose leading purpose is to derive profit from the use of land and erections thereon. In the former case it might well be said there was no more propriety in levying a tax upon the property of the corporation than upon that of a charitable or religious corporation, like a school or hospital or church ; but in the latter case there seems to be no more reason to exempt the property of a business corporation like a railway from taxation, because it is allowed to be taken under the right of eminent domain, than if it were acquired by purchase in the ordinary mode.

14. And the distinction which is made in the case of railways between structures within the limits of the road-grant and those outside of those limits, although equally important for the business of the company, shows that the exemption stands on no sound principle. For if so, it would scarcely be necessary to hold that a car house or a passenger station, so far as situated within the limits of the road-grant, was exempt from taxation, but if situated without it would not be, thus necessitating the division of the same building, when used for the same purposes.¹⁸

15. The proper distinction seems to be, that such public corporations as exist exclusively for public purposes, and not for business * purposes of profit and gain, are exempt from taxation upon such property both real and personal as is fairly necessary for carrying forward their business. But such property as is owned by such corporations and applied to ordinary business purposes is not thus exempt.¹⁹

16. The discriminating taxation of the traffic of a foreign corporation, such as a railway, amounts to a tax on commerce and is in conflict with the United States Constitution.²⁰

¹⁷ *Wayland v. Middlesex County Commissioners*, 4 Gray, 500.

¹⁸ *Worcester v. Western Railroad Co.*, 4 Met. 564; *Boston & Maine Railroad Co. v. Cambridge*, 8 Cush. 237.

¹⁹ *Meeting-House Society v. Lowell*, 1 Met. 538.

²⁰ *Erie Railway Co. v. New Jersey*, 2 Vroom. 531.

SECTION III.

Rights of Towns and Counties to subscribe for Railway Stock.

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| <ol style="list-style-type: none"> 1. State legislatures may authorize municipal subscriptions for stock in railway companies to aid in construction. 2. Such subscriptions, in another state or a neighboring province, valid. 3. Lateral railway acts in Pennsylvania constitutional. 4. Some courts have dissented from the general view. 5. Such acts have received a strict construction. | <ol style="list-style-type: none"> 6. Railways passing through must be regarded as leading to a city. 7. Federal courts may enforce their judgments against municipalities by mandamus. 8. Taxes enforceable by mandamus. 9. An extreme case stated and commented on. 10. Authority of commissioners of town in making subscription for railway stock |
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§ 230. 1. It has been considered that a railway is so far in the nature of an improved highway, that the legislature may empower towns and counties to subscribe for stock in such companies whose roads pass through such towns or counties, (a) and even where

(a) The general power of a state legislature, in the absence of state constitutional inhibition, to authorize municipal and county aid in the construction of railways, by subscription for stock or other apt method, is now firmly settled by numerous well-considered cases. *Thomson v. Lee County*, 3 Wal. 327; *Mitchell v. Burlington*, 4 Wal. 270; *Pine Grove Township v. Talcott*, 19 Wal. 666; *Perry v. Keene*, 56 N. H. 514; *Bennington v. Park*, 50 Vt. 178; *Brokaw v. Gibson County Commissioners*, 73 Ind. 543; *Opelika v. Daniel*, 59 Ala. 211. And so also is its power to authorize a gift, as well as a loan or a subscription for stock. *Council Bluffs & St. Joseph Railroad Co. v. Otoe County*, 16 Wal. 667; *Queensbury v. Culver*, 19 Wal. 83; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 93; *Otoe County v. Baldwin*, 111 U. S. 1. Nor is a constitutional provision that private prop-

erty shall not be taken for public use without compensation any restraint upon such legislation. *Council Bluffs & St. Joseph Railroad Co. v. Otoe County*, 16 Wal. 667. But the widespread embarrassment resulting from the inconsiderate and intemperate exercise of this power has in some of the states, as in New York, Illinois, Missouri, Mississippi, West Virginia, New Hampshire, &c., led to its limitation or withdrawal by constitutional amendment. And without such authority a municipal corporation cannot give such aid. *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Kendall County Supervisors*, 105 U. S. 667; *Wells v. Supervisors*, 102 U. S. 625; *Pitzman v. Freeburg*, 92 Ill. 111; *Milan v. Tennessee Central Railroad Co.*, 11 Lea Tenn. 329; *Lewis v. Clarendon*, 5 Dillon, 329. Nor can a county, which is but a *quasi* corporation, a mere governing agency charged with

they tend to increase the business of roads which do pass through any portion of the territory of such towns or counties.¹ And

¹ *Louisville & Nashville Railroad Co. v. Davidson County Court*, 1 Sneed, 637; *Slack v. Maysville & Lexington Railroad Co.*, 13 B. Monr. 1, 26; *Goddin*

the duty of local administration. *Hawkins v. Carroll County Supervisors*, 50 Miss. 735; *Hamlin v. Meadville*, 6 Neb. 227. It has been held, however, that a valid subscription or agreement to subscribe will not be affected by the subsequent adoption of such a constitutional amendment. *Moultrie County v. Rockingham Ten Cent Savings Bank*, 92 U. S. 631; *Clay County v. Society for Savings*, 104 U. S. 579. There is a contract which the state cannot impair. *Moultrie County v. Rockingham Ten Cent Savings Bank*, 92 U. S. 631.

The commonest limitation of this important power forbids the giving of such aid except upon sanction of the voters of the town or county,—as shown sometimes by a bare majority, sometimes by a two-thirds vote. But the power to tax, being a high power of government, can be exercised upon delegation only in strict conformity with the terms of the act by which it is conferred. A material departure will be fatal. *Bowling Green & Madisonville Railroad Co. v. Warren County Court*, 10 Bush, 711; *Daviess County Court v. Howard*, 13 Bush, 101. Hence the subscription will be invalid if the election be called by the wrong authority. *Bowling Green & Madisonville Railroad Co. v. Warren County Court*, 10 Bush, 711; *Richland County v. People*, 3 Brad. 210. So if the election be held upon insufficient notice. *Packard v. Jefferson County Commissioners*, 2 Col. 338; *Harding v. Rockford, Rock Island, & St. Louis Railroad Co.*, 65 Ill. 90. So if the requisite majority be not had.

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People v. Logan County, 63 Ill. 374. But it does not follow, where aid is given by a subscription to stock and the issue of municipal bonds in payment therefor, that the bonds must be altogether and in all cases void, in consequence of any such material defect in the proceedings in which they issue. It is quite settled that such bonds, as well as the coupons thereof, are negotiable instruments, and that as such they may be good in the hands of a purchaser without notice. *Moran v. Miami County Commissioners*, 2 Black, 722; *Mercer County v. Hacket*, 1 Wal. 83; *Gelpcke v. Dubuque*, 1 Wal. 176; *Meyer v. Muscatine*, 1 Wal. 384; *Thomson v. Lee County*, 3 Wal. 327; *Lexington v. Butler*, 14 Wal. 282. And it will make no difference that they bear the corporate seal. *Mercer County v. Hacket*, *supra*. Nor that the holder may be bound to receive payment, if tendered, before maturity. *Ackley School District v. Hall*, 113 U. S. 135. And it is also settled that a purchaser is not bound, where the law has conferred authority to see that all requirements have been satisfied, to look beyond the official action of the persons upon whom it was conferred; and that a recital in the bonds themselves will operate as a decision by the appointed tribunal and bind the municipality. *Coloma v. Eaves*, 92 U. S. 481; *San Antonio v. Mehaffy*, 96 U. S. 312; *Orleans v. Platt*, 99 U. S. 676; *Walnut v. Wade*, 103 U. S. 683; *Grenada County Supervisors v. Brogden*, 112 U. S. 261; *Vicksburg v. Lombard*, 51 Miss. 111. If, however, the bonds

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subscriptions * made by towns or cities to the stock of railways, without any special act of legislation, have been held valid if confirmed by subsequent legislative sanction.² (b)

v. Crump, 8 Leigh, 120; *Penn v. McWilliams*, 1 Jones, 61; *Shaw v. Dennis*, 5 Gilman, 405; *Cincinnati, Wilmington, & Zanesville Railroad Co. v. Clinton County Commissioners*, 1 Ohio St. 77; *People v. Brooklyn*, 4 N. Y. 419; *Steubenville & Indiana Railroad Co. v. North Township Treasurer*, 1 Ohio St. 105; *Sharpless v. Philadelphia*, 21 Penn. St. 147; *Moers v. Reading*, 21 Penn. St. 188; *Bridgeport v. Housatonic Railroad Co.*, 15 Conn. 475; *Stein v. Mobile*, 24 Ala. 591; *Covington & Lexington Railroad Co. v. Kenton County Court*, 12 B. Monr. 144; *Cass v. Dillon*, 2 Ohio St. 607; *Talbot v. Dent*, 9 B. Monr. 526; *Nichol v. Nashville*, 9 Humph. 252; *Ryder v. Alton & Sangamon Railroad Co.*, 13 Ill. 516; *Clark County Court v. Paris, Winchester, & Kentucky River Turnpike Co.*, 11 B. Monr. 143; *New Orleans, Opelousas, & Great Western Railroad Co. v. McDonogh*, 8 La. An. 341; *Strickland v. Mississippi Railroad Co.*, cited in 21 Miss. 209; *Dubuque County v. Dubuque & Pacific Railroad Co.*, 4 Green, 1. But this case is overruled in *Stokes v. Scott County*, 10 Iowa, 166, and in *Iowa v. Wapello County*, 18 Iowa, 388. It is not now important to discuss the principle of these conflicting decisions,

* *Bridgeport v. Housatonic Railroad Co.*, 15 Conn. 475. The decisions in the several states seem all to have been in favor of the power of the legislature

were apparently issued without authority, a purchaser for value cannot enforce them. He is not a purchaser without notice. *East Oakland v. Skinner*, 94 U. S. 255; *South Ottawa v. Perkins*, 94 U. S. 260; *Wilson v. Cananda*, 15 Hun, 218; *Sykes v. Columbus*, 55 Miss. 115; *Barnes v. Lacon*, 84 Ill. 461. Nor is he where the recitals in the bonds show that the law governing their issue was not complied with. *Harshman v. Bates County*, 92 U. S. 569; *McClure v. Oxford Township*, 94 U. S. 429; *Bates County v. Winters*, 97 U. S. 83. Nor can he enforce them, if there was an actual want of authority to issue them, notwithstanding recitals in the bonds. Recitals cannot cure a want of authority. *Toledo Northern Bank v. Porter Township Trustees*, 110 U. S. 608. Recitals binding upon the municipality relate to regularity in procedure. Cases holding that recitals as to such

matters — various steps in the execution of the power conferred by the statute — are binding by way of estoppel or otherwise, are numerous, too numerous to be here noticed. But see *Bissell v. Jeffersonville*, 24 How. 287; *Moran v. Miami County Commissioners*, 2 Black, 722; *Mercer County v. Hackett*, 1 Wal. 83; *Van Hostrup v. Madison*, 1 Wal. 291; *Meyer v. Muscatine*, 1 Wal. 384; *Moultrie County v. Rockingham County Ten Cent Savings Bank*, 92 U. S. 631; *Wilson v. Salamanca*, 99 U. S. 499; *Daviess County v. Huidekoper*, 98 U. S. 98; *Dallas County v. McKenzie*, 110 U. S. 686, leading cases upon this point. But such recitals must be clear and unambiguous. *Independent School District v. Stone*, 106 U. S. 183; *Carroll County v. Stone*, 111 U. S. 556. And see *Anderson County Commissioners v. Beal*, 113 U. S. 227.

(b) The legislature, unless restrained

* These questions seem now to be placed completely at rest, as far as the validity of the statutes of state legislatures authorizing

since the tide of judicial opinion is almost all in one direction and not in concurrence with the latter determination. As for the writer, he never could comprehend the basis on which so many able jurists in this country have professed to perceive clearly the reasons for giving municipal corporations the power to become stockholders in railway companies. He has always felt that it was one of those cases where the wish was father to the thought. See *Griffith v. Crawford County Commissioners*, 20 Ohio, 609, where SPAULDING, J., assumes that, under the Ohio constitution, prohibiting the state from giving or loaning its credit "to, or in aid of, any individual, or association, or corporation whatever, and from becoming a joint owner or stockholder in any company or association, in the state or elsewhere, formed for any purpose whatever," they cannot authorize a county, by a vote of the majority of its citizens, to subscribe for stock in a railway. But the question did not necessarily arise, the case

to build railways, at the public expense, of which there is perhaps no great question, for it seems to be a species of internal improvement or intercommunication, which is, in a measure, indispensable to public interests and public functions, in many ways.

The right, too, of the United States to do, or to aid in doing, the same, for purposes of conveying the mails, the army and its material, and for other public purposes, seems now to be almost universally conceded.

But, in regard to the power of the legislature to empower municipal corporations to subscribe for railway stock, there has been more controversy. The dissenting opinions of some of the judges, where the majority of the court have maintained the validity of such subscriptions, would appear to have the advantage of the argument, especially where it has been attempted to impose a burden on municipal corporations for the erection of railways beyond their

by the organic law, may ratify the act of a town or county which without authority has voted a subscription to the stock of a railroad company, and authorize an issue of bonds in payment thereof. *Jonesboro v. Cairo & St. Louis Railroad Co.*, 110 U. S. 192. And see *Grenada County Supervisors v. Brogden*, 112 U. S. 261. Such a statute is not within a constitutional prohibition of the passage of retrospective laws. *Ritchie v. Franklin County*, 22 Wal. 67. Ratification is equivalent to original authority. *Beloit v. Morgan*, 7 Wal. 619.

And the municipality itself may, in some cases, validate bonds irregularly

issued, upon sufficient authority, in the hands of a *bona fide* holder, e. g., by levying taxes to pay and therewith paying interest thereon. *Marshall County Supervisors v. Schenck*, 5 Wal. 772; *Clay County v. Society for Savings*, 104 U. S. 579. But otherwise where there was a total want of power in the municipality to issue them, and not a mere failure to comply with certain requirements. *Parkersburg v. Brown*, 106 U. S. 487. Nor can supervisors validate bonds, void because issued to a company to which there was no authority to issue them. *Marsh v. Fulton County*, 10 Wal. 676. But see *infra*, note (d).

* towns, cities, counties, and other similar corporations, to subscribe to the capital stock of railways, is concerned. The ques-

having been decided on other grounds. See also *Pennsylvania Railroad Co. v. Philadelphia*, 47 Penn. St. 189; *Stokes v. Scott County*, 10 Iowa, 166; *Taylor v. Newbern*, 2 Jones Eq. 141; *St. Louis v. Alexander*, 28 Mo. 483. The question was here held properly referable to the voters of the district making the subscription. The legality of such subscriptions seems to be recognized by two cases in Louisiana. *Vicksburg, Shreveport, & Texas Railroad Co. v. Ouachita Parish*, 11 La. An. 649; *Parker v. Scogin*, 11 La. An. 629. It is maintained in Maine. *Augusta Bank v. Augusta*, 49 Maine, 507.

In a case in the Circuit Court for the District of Indiana, before Mr. Justice McLEAN, after the most elaborate discussion on the point of the competency of counties, by legislative permission, to make subscriptions for building railways passing through such counties, and to issue bonds with coupons for the amount of such subscriptions, it seems to have been held, without hesitation, that such bonds are valid and binding on the counties. In this case the question of the subscription was submitted to the voters of the county. 9 Am. Railw. T., June 18, 1857. See also *Cotton v. County Commissioners*, 6 Fla. 611; *Slack v. Maysville & Lexington Railroad Co.*, 13 B. Monr. 1; *Cass v. Dillon*, 2 Ohio St. 607; *Thompson v. Kelly*, 2 Ohio St. 647.

In *Fosdick v. Perrysburg*, 14 Ohio St. 472, it was held, following *Cass v. Dillon*, 2 Ohio St. 607, that special acts, authorizing certain municipalities to subscribe for stock and issue bonds in aid of certain railways, were not abro-

territorial limits, although incidentally affecting their pecuniary interests, by way of business. The fallacy in the argument by which the leading opinions have been attempted to be maintained, seems to consist in assuming that corporate interests of municipal corporations extend to everything affecting their general wealth and business prosperity. Whereas, in truth, we are compelled to limit such interests at a point far short of this. Everything which is practically indispensable to the security of life and property, or to the successful pursuit of business, and to the furtherance of public improvement and enterprise, and which is strictly within the territorial limits of the corporation, is, undoubtedly, to be fairly regarded as of municipal interest and concern. But when we include every improvement and public enterprise which centres in such municipality, there seems to be serious difficulty in fixing any just limits to the public burden which such corporations shall impose by the consent of the legislature, which is ordinarily no sure barrier against unjust taxation for the fostering and support of public works. These and similar considerations have given the writer such distrust of the justice and legality of these municipal subscriptions for railway stock, that, if the question were altogether new, he would entertain great doubts and serious hesitation in regard to the practice coming appropriately within the range of municipal powers and duties. It seems that if these public works require public patronage, it would more appropriately come from the state than from the municipalities, which are created for limited purposes, and with no appropriate facilities for

tion of *expediency and even of legality is still discussed as a speculative inquiry. And occasionally we notice a feeble judicial

gated either by subsequent changes in the constitution or by the subsequent repeal of all acts for the organization or government of municipal corporations; and that a limitation of the taxing power for the payment of interest on such bonds removed the obligation to impose sufficient taxes to pay the interest on bonds issued under such special acts, though for this purpose it should be necessary to exceed the limitation subsequently fixed. And a slight misnomer of the municipality issuing such bonds does not affect their legality. The general question of the construction of legislative acts is here ably discussed. And see *Knox County Commissioners v. Nichols*, 14 Ohio St. 260. And slight misnomers and variations from directory provisions were also disregarded in *Maddox v. Graham*, 2 Met. Ky. 56. In *Evansville Railroad Co. v. Evansville*, 15 Ind. 395, suit was brought against Evansville on a subscription to the stock of the railroad company. The contract of subscription was executed on behalf of the city by its mayor, ostensibly in pursuance of an order of the common council, and was conditioned, that the company should receive the bonds of the city at par in payment of the subscription; that the bonds were not to be convertible into stock, and were to be delivered concurrently with the delivery of the certificates of stock; that the certificates of stock should bear interest at the rate of seven per centum until the completion of the road to Indianapolis; that the

the management of pecuniary investments in such extended enterprises. But the weight of authority is on the other side, and it is now too late to bring the matter into serious debate, certainly until a larger experience is had of the impediments attending the management of investments in railway companies by municipal corporations. The distinction between the case of building a railway leading into a city, which only incidentally affects the business interests of the city, and the case of building an extensive aqueduct for the supply of water to the inhabitants of a city or town, and for nothing else, is too obvious to require explanation.

In *Commonwealth v. Pittsburg*, 41 Penn. St. 278, it was held that a failure of a company to commence its work within the time limited by the original charter did not invalidate a municipal subscription to its stock, when by supplemental act the period had been extended, the legislature having the right to waive a privilege of resuming its franchises. See also *Clark v. Des Moines*, 5 Am. Law Reg. N. S. 146. And in Illinois it was held that county bonds in aid of the construction of a railway, issued in pursuance of an election held without warrant of law, ordered, e. g., by a person or tribunal having no such authority, were absolutely void. But where the election has been properly authorized, and there has been informality in the manner of submitting the question to the people, such as submitting two propositions as to aiding two separate roads, at a single vote, the bonds may be rendered valid in the hands of an innocent holder, by the acquiescence of the people and their subsequent ratification by the county, in levying a tax and paying interest on them. *Clarke v. Hancock County Supervisors*, 27 Ill. 305.

remonstrance * in the courts against extremes. But the tide rolls on with the general approbation, and the only hope now is to be able to fix such limits to railway extension, by means of municipal aid, that the entire property of the country may not be thrown into public and official administration by means of the

city might issue certificates for all taxes collected to pay the interest on said bonds, and that such certificates should be convertible into stock on presentation by the holders in sums of fifty dollars, which should bear interest until the road was completed. It was averred that one hundred thousand dollars of said bonds were issued, but that the city had failed to deliver the residue of said bonds, and thereby became liable to pay the amount in money. By the charter of the city, the common council was authorized to take stock in any company chartered for the purpose of making roads to the city, provided that no stock should be subscribed for or taken, unless on the petition of two thirds of the resident freeholders, distinctly setting forth the company in which stock should be taken, and the number and amount of shares to be subscribed for, and that in all cases where such stock was taken, the common council should have authority to borrow money and lay and collect a tax on real estate, to pay therefor. The court held, that railways were embraced within the terms of the charter; that the common council would have no power at all to subscribe in the absence of the petition provided for; but when once the power was conferred, the manner of exercising it, and the time and mode of payment were left wholly to their discretion; that if the company saw fit to receive the bonds as cash, in payment of the subscription, instead of requiring the city to negotiate and raise money on them, the transaction was not beyond the corporate powers of either the city or the company; that there was nothing against law or public policy in the agreement of the company to allow the city interest on the stock subscribed for by it; and as long as neither the railway company nor any of its stockholders complained of the provisions of the agreement, the city could not avoid the contract of subscription on the ground that it contained a stipulation which the railway company had no power to make; that though the contract of subscription, as made by the mayor, might have deviated in some particulars from the orders of the common council, yet the latter had adopted and ratified it as made by issuing a portion of the bonds provided for in it. That this was not the delegation by the common council to the mayor of authority which they alone could exercise, but that he was simply the instrument by means of which they acted. That it was the duty of the common council to determine whether the requisite number of the freeholders of the city had petitioned for the subscription, no other tribunal having been appointed for that purpose; and that, having passed on that question, their determination was conclusive, unless set aside in some direct proceeding for that purpose. See *Sinking Fund Commissioners v. Northern Bank of Kentucky*, 1 Met. Ky. 174, where a lien on a road given to the city of Louisville was held binding on companies to which the road had been sold by the state.

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unlimited power of extension of taxation. In all the first three editions of this work, the author labored to define the power of taxation, and to hedge it round by such constitutional restrictions as might tend to keep it within such limits as not to endanger the absorption of the entire fruits of personal industry and enterprise. But the results of the late civil war, and the enormous increase of public indebtedness of every kind, municipal, state, and national, has placed all private and personal rights, by general acclamation, at the discretion of legislative majorities. This is a result of which we do not complain, and, indeed, it is one for which in one sense we long contended, in the early portion of our judicial labors, and which, we have reason to know, was not without its results, in producing a greater degree of legislative independence in some of the states.³ * But we think it equally proper and prudent now that the change has come, and the jealousy of the extension of legislative innovation has ceased to exist, or else has been transferred to the courts who presume to interpose any restrictions even of a constitutional character in the way of legislative omnipotence, — now that this great change has come, it cannot but be wise to become familiar with the terms in which it is defined.

In *Thomson v. Lee County*,⁴ the Supreme Court of the United States declare that the legislature of a state, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railway or other work of internal improvement; to borrow money to pay for it, and to levy a tax to repay the loan; and the state legislatures may also, by retrospective acts, cure any evils existing in consequence of powers so conferred having been irregularly exercised. And that this power may be exercised either by, or without submission to

³ *Thorpe v. Rutland & Burlington Railroad Co.*, 27 Vt. 140; s. c. 2 Redf. Am. Railw. Cas. 587; *State v. Conlin*, 27 Vt. 318; *Lincoln v. Smith*, 27 Vt. 328; *State v. Parker*, 26 Vt. 357.

⁴ 3 Wal. 327. And in *Butz v. Muscatine*, 8 Wal. 575, the same court, in order to enforce one of its judgments against the defendants, was compelled to set at defiance the rule prescribed in the act of Congress for the government of their decisions, in cases between party and party, viz., the decisions of the state courts; MILLER, J., dissenting. The city or municipality having long acquiesced in the validity of bonds issued by them, the requisite formalities will be presumed to have been complied with. *Pendleton Co. v. Amy*, 13 Wal. 297.

a popular vote. And the Court of Appeals in New York⁵ have adopted the same rule, in the exact terms declared by the Supreme Court of the United States. We think there need be no further discussion upon this point.

2. It was held that the statute of New York authorizing railway companies of that state to subscribe for stock in the Great Western Railway, Canada West, is constitutional.⁶ (c)

* 3. And the lateral railway acts in Pennsylvania, by which every county in the state is authorized to make railways, and to condemn land and other private property for the purpose, are held

⁵ *People v. Mitchell*, 35 N. Y. 551.

⁶ *White v. Syracuse & Utica Railroad Co.*, 14 Barb. 559. The city council of Charleston have the power, under the city charter, to subscribe to the stock of railway companies within and without the state, and to tax the inhabitants of the city for the purpose of paying the subscriptions. *Copes v. Charleston*, 10 Rich. 491. The council having at different times subscribed to the stock of railway companies within and without the state, the legislature by an act of 1854 confirmed all such subscriptions, and declared them obligatory on the city council. It was held that the act of 1854 was constitutional; and that no proceeding by *quo warranto* in the name of the state for the purpose of questioning the validity of such subscriptions could afterwards be taken. *Ib.*

(c) It is no objection that the road aided is outside of the county or even outside of the state, the effect of its construction being to give the county a desirable connection with some other region. *Council Bluffs & St. Joseph Railroad Co. v. Otoe County*, 16 Wal. 667; *Otoe County v. Baldwin*, 111 U. S. 1. See *Quincy, Missouri, & Pacific Railroad Co. v. Morris*, 84 Ill. 410, where a subscription by a city to stock of a railroad lying wholly in another state was upheld. But see *contra*, *Allen v. Louisiana*, 103 U. S. 80.

Nor is it an objection that the corporation to whose stock the subscription is made is not the corporation named in the authority to subscribe, it being a corporation formed by consolidation of that corporation with an-

other, and performing substantially the same functions and having substantially the same route. *Scotland County v. Thomas*, 94 U. S. 682; *Schuyler County v. Thomas*, 98 U. S. 169; *Unity v. Burrage*, 103 U. S. 447; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73; *Bates County v. Winters*, 112 U. S. 325. And it will make no difference that the corporation with which the consolidation is effected is a foreign corporation. *Scotland County v. Thomas*, 94 U. S. 682; *Menasha v. Hazard*, 102 U. S. 81. Nor will a transfer of franchises after subscription defeat the right to the bonds. *Henry County v. Nicolay*, 95 U. S. 619; *Ray County v. Vansycle*, 96 U. S. 675.

to be constitutional and valid,⁷ which is much the same as subscriptions to railway stock by the counties.

4. Some of the New York District Supreme Courts have held, that the constitution of the state, by fair construction, prohibited municipal corporations from making subscriptions to the stock of railways.⁸ And it was held by the Supreme Court of Ohio, that, where an act of the legislature authorized the trustees of the several townships through which the railway "may be located" to subscribe to the capital stock of the company, and the preliminary * vote of the tax-payers and the subscription were made before the road was laid, the subscription cannot be enforced, although the road is subsequently laid through the township.⁹

⁷ *Harvey v. Thomas*, 10 Watts, 63; *Harvey v. Lloyd*, 3 Penn. St. 331; *Schoenberger v. Mulhollan*, 8 Penn. St. 134.

⁸ *Clarke v. Rochester*, 5 Am. Law Reg. 289; 13 How. Pr. 204. The opinion of the court, in this case, by ALLEN, J., assumes grounds which tend very strongly to subvert the general right of such corporations to make such subscriptions. But this case was reversed in the general term of the Supreme Court. 24 Barb. 446. It is here said by the court, that internal improvements may be constructed by general taxation, and in local works by local taxation; or that the state may aid in their construction by becoming a stockholder in private corporations, or authorize municipal corporations to become such stockholders for that purpose. Railways are public works, and may be constructed by the state or by corporations. And in *Grant v. Courter*, 24 Barb. 232, it is decided, that an act of the legislature authorizing the towns, in the counties through which the Albany and Susquehanna Railway is located and in progress of construction, to borrow money, and subscribe for and purchase the stock of the company, with the view of aiding in the completion of the work, is not in contravention of any express or implied constitutional limitation of the power of the legislature, and that the act was within the general power of legislative authority in the state; that the act did not deprive any citizen of his property, or take private property for public use; that this could not be held to be the case, except where property was directly taken and appropriated to public use. In *Benson v. Albany*, 24 Barb. 248, the same principle is reasserted in regard to an act of the legislature authorizing the city of Albany to loan its credit to the Northern Railway. And this doctrine was afterwards sustained in the Court of Appeals. *Starin v. Genoa*, 23 N. Y. 439. The bonds in this case were held void, the prerequisites to their issue not having been complied with. And in *Wynn v. Macon*, 21 Ga. 275, the general power of municipal corporations to subscribe for railway stock, by consent of the legislature, is maintained, and also that the legislature may ratify such subscriptions made before the act. And the same principle is maintained in *Butler v. Dunham*, 27 Ill. 474; *Commonwealth v. Perkins*, 43 Penn. St. 400.

⁹ *Steubenville & Indiana Railroad Co. v. Jackson*, 4 Am. Law Reg. 702. This case must be thought to have been put on too narrow grounds, if the
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5. Where the act of the legislature gave counties the power to subscribe for stock in a railway, *after* and not *before*, the same shall have been "designated, advised, and recommended" by a grand jury, it was held that the recommendation of the grand jury, that the county subscribe for such stock "to an amount not exceeding \$150,000," was not such a compliance with the statute as to justify any subscription. They should define the amount more strictly.¹⁰ And bonds of the county issued on such a subscription were enjoined, upon a bill in equity at the suit of the county.¹¹ (*d*)

principle itself were not regarded as one of doubtful character, and therefore to be strictly construed. See also *Treadwell v. Hancock County Commissioners*, 11 Ohio St. 183.

¹⁰ *Mercer County v. Pittsburg & Erie Railway Co.*, 27 Penn. St. 389; *Wetumpka v. Winter*, 29 Ala. 651. But it was afterwards held that the fact that one grand jury requested the county commissioners to subscribe twenty thousand shares to the capital stock of the Alleghany Railroad Company, and the commissioners subscribed but fifteen thousand, in no way invalidated the subscription made. *Commonwealth v. Perkins*, 48 Penn. St. 400. In *Moran v. Miami County Commissioners*, 2 Black, 722, it was held, that, though acts of incorporation and other statutes granting special privileges are to be construed strictly, and whatever is not given in express terms is to be deemed to have been withheld, this principle must be applied to the subject-matter as a whole, and in such a manner as not to defeat the intention of the legislature. Where a county subscribed for stock in a railway company, and issued bonds to pay therefor, under an act of assembly, providing that such bonds should not be sold below par, and the company sold many of them at sixty-four per cent, it was held that the county might withdraw the subscription, recover the bonds unsold, and the par value of those which had been sold. *Lawrence County v. Northwestern Railroad Co.*, 32 Penn. St. 144. But where the county commissioners themselves sold the bonds below par, the county was held bound to provide for the accruing interest. *Commonwealth v. Alleghany County Commissioners*, 32 Penn. St. 218. In *Woods v. Lawrence County*, 1 Black, 386, a provision that counties might subscribe for stock and pay in county bonds, such bonds not to be sold below par, was held to mean only that the railway company must take them at par.

¹¹ The commissioners of any county through which a certain road might be located, were by statute authorized, after obtaining a vote of the qualified voters of the county in favor of subscription, to subscribe to the capital stock of said company, and to borrow money to pay the same; and if the commissioners of any such county should not be authorized by the voters to subscribe, then the trustees of any township through which the road might be laid

(*d*) See *supra*, note (*a*).

*6. A legislative permission to subscribe to the stock of roads leading to the municipality will embrace those passing through it. And it was here held, that such corporations by legislative permission clearly had power to subscribe for railway stocks.¹² In the *further discussion of this case before the courts,¹³ it was decided, that negotiable securities issued by a municipal corporation in payment of subscriptions to the capital stock of a railway company are subject to the law merchant, and that mercantile paper declared void by statute *ab initio*, is void in the hands of *bona fide* holders, and that, as it requires special statutory authority for such corporations to subscribe for railway stock, which must be strictly followed, if the bonds upon their face refer to the authority under which they issue, all persons purchasing the same are affected with notice of any defect in such authority.

7. The judgments of the courts against municipal corporations upon bonds issued to aid in the construction of railways and other were authorized to subscribe and provide for its payment in the same manner. A county duly subscribed, and subsequently the trustees of a township in that county ordered an election to be held in the township on the question of a township subscription, and pursuant to a vote made a subscription, and in payment therefor executed and issued certificates of indebtedness to the amount of the subscription.

On proceedings by mandamus to compel the trustees of the township to levy a tax to pay such certificates, it was held, that they were not authorized to subscribe to the stock of the company, after a subscription had been made on behalf of the county; and that the acts of the trustees, being without authority of law, imposed no liability on the township. *Beckel v. Union Township*, 15 Ohio St. 437, sustaining *Hopple v. Brown Township*, 13 Ohio St. 311, which was decided on a similar state of facts. But a view more favorable to the validity of such subscriptions was taken in *Evansville & Crawfordsville Railroad Co. v. Evansville*, 15 Ind. 395. And see *State v. Hancock County Commissioners*, 12 Ohio St. 596; *Commonwealth v. Perkins*, 43 Penn. St. 400. And in Illinois, it has been held, that in an election to decide whether aid shall be given to a railway company, a mere irregularity in conducting it, which does not deprive any voter of his franchise, or allow an illegal vote, will not vitiate the same. *Piatt v. People*, 29 Ill. 54. And see *Whittaker v. Johnson*, 10 Iowa, 161.

¹² *Aurora v. West*, 9 Ind. 74. But if the charter do not fix the line to the required point, in order to authorize the subscription, it must be so fixed by the action of the directors, and until so fixed no valid subscription can be made by such corporation to the stock, and the corporation as well as the directors are affected by notice of the location of the road. s. c. 22 Ind. 88.

¹³ *Aurora v. West*, 22 Ind. 88. See also *Bartholomew County v. Bright*, 18 Ind. 93.

public works, are usually enforced by mandamus commanding the corporation to levy a tax and satisfy the same. In consequence of the United States Constitution giving a general jurisdiction to the national courts, in ordinary common-law suits between party and party, provided they reside in different states, many of these suits are brought in the circuit courts of the United States, and a conflict of authority had arisen between the state and national courts in one state. But the court of last resort in such questions hold that after the return of *nulla bona* to an execution issued by a circuit court of the United States against a municipal corporation of a state, bound to levy a tax to pay its debts, mandamus lies from such circuit court to compel the levy, (e) even though the state court after such judgment obtained in the circuit court, and before the application for such mandamus, have enjoined the levy.¹⁴

8. Ordinary taxes, assessed upon a railway, and removed into the highest judicial tribunal in the state and there affirmed, may be enforced by writ of mandamus, where there is no other adequate remedy.¹⁵ And the same rule would, doubtless, be held equally applicable to all taxes assessed, when there was no valid defence.

9. Perhaps the most remarkable case which has yet been decided upon this subject is that of *Walker v. The City of Cincinnati*,¹⁶ in which it is declared that a constitutional provision

¹⁴ *Riggs v. Johnson County*, 6 Wal. 166; *Weber v. Lee County*, 6 Wal. 210; *United States v. Keokuk*, 6 Wal. 514, 518; *Walkeley v. Muscatine*, 6 Wal. 481.

¹⁵ *Person v. Warren Railroad Co.*, 32 N. J. Law, 441.

¹⁶ 11 Am. Law Reg. N. S. 346; s. c. 21 Ohio St. 14. And one state has had the sense and courage so far to resist the tide of public sentiment in favor of building railways by municipal aid, as to hold that it is not compe-

(e) So held in *Knox County Commissioners v. Aspinwall*, 24 How. 376; *Von Hoffman v. Quincy*, 4 Wal. 535; *Amy v. Des Moines County Supervisors*, 11 Wal. 136; *United States v. New Orleans*, 98 U. S. 381; *Wolff v. New Orleans*, 103 U. S. 358; *Hawley v. Fairbanks*, 108 U. S. 543. And it is no objection that it is to compel an act by persons not parties to the suit, the act being a duty arising out of the judgment. *Labette County Commissioners v. United States*, 112 U. S. 217. Nor can an injunction from the state court restraining a levy be set up to prevent the issue of the mandamus. *Davenport v. Lord*, 9 Wal. 409; *Washington County Supervisors v. Durant*, *Ib.* 415. But mandamus will not issue to compel payment from a fund raised pursuant to charter for current expenses and only sufficient for that purpose. *East St. Louis v. United States*, 110 U. S. 321.

inhibiting any town or city from aiding any corporation in the construction of a railway, will not preclude such town or city from constructing and owning the entire work, and thereby expending ten millions in building a railway from Cincinnati to Chattanooga, through portions of three states. If one had desired a case to illustrate, by way of the *reductio ad absurdum*, the entire and utter fallacy and injustice upon which this whole class of decisions is based, he could scarcely have imagined one more to his purpose.

10. Commissioners appointed by a town to subscribe on its behalf for stock in a railway are special agents and not officers. They must therefore act jointly and not by majorities. They are the agents of the town for a special purpose, and any condition annexed to the subscription by them will bind the town unless repudiated by them, and when they have once acted they have no further authority and cannot make any further subscription binding upon the town.¹⁷ (f)

tent for the legislature to confer *unlimited* powers upon the municipalities for this purpose. *Fisk v. Kenosha*, 26 Wis. 23. And another state, with a proper appreciation of the ludicrous character of the decisions on the subject, has decided that a county authorized by law to subscribe to the capital stock of a railway, which has issued its bonds in payment of the subscription, is not liable to an action on the bonds. *English v. Chicot County*, 26 Ark. 454. And in *Hanson v. Vernon*, 27 Iowa, 28, a majority of the court held such acts unconstitutional. But these and some few other decisions in the same direction amount to little more than protests against what we can regard as nothing better than a general demoralization. Some few cases have attempted to make a distinction between subscribing to the capital stock of a railway company and giving outright in aid of the enterprise, as if the latter were further from the ordinary functions of municipalities. *Whiting v. Sheboygan Railroad Co.*, 9 Am. Law Reg. N. S. 156; S. C. 25 Wis. 167. *People v. Salem*, 25 Wis. 487; S. C. 20 Mich. 452. But to us this seems less objectionable than becoming a shareholder in a private corporation, the latter being as remote from the proper functions of a municipal corporation as anything possible.

¹⁷ *Danville v. Montpelier & St. Johnsbury Railroad Co.*, 43 Vt. 144.

(f) As to who are the proper officials to issue bonds, see *Curtis v. Township*, 112 U. S. 433. As to the person who must sign the bonds, see *Butler County*, 24 How. 435; *Walnut v. Wade*, 103 U. S. 683; *Kankakee County v. Aetna Life Insurance Co.*, 106 U. S. 668; *Middleton v. Mullica* ship, 110 U. S. 162. *Weyauwega v. Ayling*, 99 U. S. 112; *Ralls County v. Douglass*, 105 U. S. 728; *Bissell v. Spring Valley Township*, 110 U. S. 162.

PART XII.
CONSTITUTIONAL QUESTIONS.

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• CHAPTER XXXII.

CONSTITUTIONAL QUESTIONS.

SECTION I.

Railway Grants when Irrevocable and Exclusive.

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| 1. In England parliament has unrestricted power over corporations. | 7. Forfeiture for the benefit of a county may be remitted by legislature. |
| 2. Limitation of power of states under the federal constitution. Impairment of the obligation of contract. | 8. Reservation of right to repeal the charter of a corporation. Presumption of proper exercise. |
| 3. Essential requisites of an exclusive and irrevocable franchise or grant. | 12, 13. Exclusive rights to bridges at particular places. Rights of different grantees along tide-waters. |
| 4, 10, 11. Such grants strictly construed in favor of the public. | 14. Decision of court not a violation of the provision against laws impairing the obligation of contracts. |
| 5, 9. Exclusive grant of right to carry between two points infringed by co-operation of way-lines. | 15. Requirement that a railway pay part of its passenger fares to the state, constitutional. |
| 6. Grants of the use of navigable waters for manufacturing revocable. | |

§ 231. 1. VERY little is said in the English statutes or treatises in regard to the exclusive powers of railway corporations, it being assumed there that parliament has entire control over such corporations, even to dissolve them. It would follow, of course, that the legislature, having the power to dissolve the corporation at will, might impose any desired restrictions.¹

¹ Co. Lit. 196, note o; 1 Bl. Com. 484; Dartmouth College v. Woodward, 4 Wheat. 518. But to the credit of the English nation, this power has never been exercised, except in one or two extreme cases involving essential political rights, as the suppression of the order of Templars in the time of Edward the Second, and of the religious houses in the reign of Henry the

2. But in the United States the several state legislatures (*a*) are expressly prohibited from passing "any law impairing the obligation of contracts," (*b*) which has been construed to contain a prohibition against taking away, or impairing the exercise of, any of the essential franchises of a corporation.² And the rule

Eighth. And it is settled law in Great Britain, that, although the sovereign may create, he cannot dissolve, a corporation. *King v. Amery*, 2 T. R. 515, 568; *King v. Passmore*, 3 T. R. 190, 205, 206.

² *Dartmouth College v. Woodward*, 4 Wheat. 518; *Bridge Proprietors v. Hoboken Land & Improvement Co.*, 1 Wal. 116. And the same doctrine is maintained in the case of *The Binghamton Bridge*, 3 Wal. 51, 71. And in this case it was held, that the statute of a state may make a contract as well by reference to a previous enactment making one, and extending the rights, &c., granted by such enactment to a new party, as by direct enactment setting forth the contract in all its particular terms. And a third contract may be

(*a*) Not merely the state legislatures, but the states. Though action by the legislature, as the ordinary law-making power, is more frequently restrained by this inhibition of the constitution and almost always exclusively thought of in connection therewith, action by the people themselves, as the real source of all state law, is equally within its purview; and hence a provision of a state constitution is as much forbidden as a statute, if it but impair the obligation of a contract. *Ohio & Mississippi Railroad Co. v. McClure*, 10 Wal. 511; *White v. Hart*, 13 Wal. 646; *Scotland County v. Missouri, Iowa, & Nebraska Railway Co.*, 65 Mo. 128.

And not only so, but the obligation of a contract is sometimes secure against impairment by subsequent judicial exposition of the law. Where a contract when made is valid by the constitution and laws of a state as then expounded by the highest judicial authority charged with the duty of expounding them, no subsequent contrary exposition of them can make it invalid. *Gelpcke v. Dubuque*, 1 Wal. 175; *Havemeyer v. Iowa County*, 3

Wal. 294; *Thomson v. Lee County*, 3 Wal. 327; *Mitchell v. Burlington*, 4 Wal. 270; *Chicago v. Seldon*, 9 Wal. 50; *Olcott v. Fond du Lac County Supervisors*, 16 Wal. 678.

(*b*) Laws in force when and where a contract is made and where it is to be performed are a part of its obligation, whether they relate to its construction or its validity, its enforcement or its discharge. *Walker v. Whitehead*, 16 Wal. 314. A general law, for instance, providing that all charters shall be subject to amendment or repeal at the pleasure of the legislature. *Holyoke Water-Power Co. v. Lyman*, 15 Wal. 500; *Tomlinson v. Jessup*, 15 Wal. 454; *Hoge v. Richmond & Danville Railroad Co.*, 99 U. S. 348. And as they are a part of the contract, a part they will remain, though they are subsequently repealed. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25. Where the law provides that charters shall be subject to repeal at the pleasure of the legislature, a repeal destroys whatever rights, franchises, or powers depend on the charter for existence. *Greenwood v. Union Freight Railroad Co.*, 105 U. S. 13.

obtains * practically in Great Britain, as will appear by the constitutional history of that country. And in this country, the question in regard to what is to be considered an essential franchise of a corporation, is one admitting of almost indefinite range of construction or discretion.³

* 3. But in this country it is generally required, that, to place the powers granted to a corporation above the control of the legislature, they must be either such powers as are essential to the existence and just operation of a corporation of the kind in question, or else they must be expressly secured to the corporation in its charter.⁴ And where the grant to a railway, or other

made in a subsequent statute by importation from the previously imported contract, in the former statute, and a fourth contract by importation from the third. The Binghamton Bridge, *supra*. But the foregoing rules will not extend to public corporations, like towns and cities, whose organic law is always subject to legislative control, especially in regard to taxation. *Richmond v. Richmond & Danville Railroad Co.*, 21 Grat. 604.

* *Thorpe v. Rutland & Burlington Railroad Co.*, 27 Vt. 140; s. c. 2 Redf. Am. Railw. Cas. 587, where it is said: "It is admitted that the essential franchise of a private corporation is recognized by the best authorities as private property, and cannot be taken without compensation, even for public use. *Armington v. Barnet*, 15 Vt. 746; *West River Bridge Co. v. Dix*, 16 Vt. 476; s. c. in error, 6 How. 507; 1 Shelf. Railw. Bennett's ed. 441, and cases cited; *Turnpike Co. v. States*, 3 Wal. 210. Authority given to a corporation by its charter to "purchase and possess lands, tenements, and hereditaments, and personal estate of any kind whatsoever, . . . and to sell and dispose of the same," does not give the corporation power to assign promissory notes. In order to derive a power for a corporation by implication, it must appear that the power thus sought to be derived is so necessary to the enjoyment of specially granted right, that without it that right would fail. The power to assign promissory notes is not essential to the enjoyment of the franchise of banking, or dealing in exchange and stocks and constructing a railway, and hence cannot be implied from the grant of such franchises to a corporation. *McIntyre v. Ingraham*, 35 Miss. 25. And see *Madison, Watertown, & Milwaukee Plank-Road Co. v. Watertown & Portland Plank-Road Co.*, 7 Wis. 59. The statute existing in some of the states, making railway companies responsible for all damage done to domestic animals, without regard to negligence on their part, is held to be an important police regulation, for the security of passengers, and applicable equally to railways chartered before and to railways chartered after the date of the statute. *Indianapolis, Pittsburg, & Cleveland Railroad Co. v. Marshall*, 27 Ind. 300.

* *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. And a law authorizing the courts to sell the franchises and property of a corporation, on the application of creditors, in payment of its debts, is not beyond the legislative power. *Louisville & Oldham Turnpike Co. v. Ballard*, 2 Met. Ky. 165.

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similar corporation, is not exclusive in terms, thus prohibiting the legislature from creating any rival corporation within the prescribed limits, either of time or distance, the legislature may grant other charters to similar corporations, essentially interfering with the utility and profit of the former franchise or corporation.⁵ And even the fact * that the franchise of the former corporation is essentially destroyed for all beneficial purposes to the grantees, is not sufficient objection to the validity of the subsequent grant, the legislature, from whose decision there is practically no appeal, being themselves the judges when and where the public good requires other similar grants. This rule did not obtain without considerable opposition, but it seems now firmly established in the national jurisprudence.⁶

4. And the national tribunal of last resort has of late certainly manifested a marked inclination to construe these exclusive grants to corporations with very considerable strictness as to the corporations, and with large indulgence in favor of the public, so as to restrain such exclusive privileges, which are always more or less in derogation of public right, within the narrowest limits.⁷ (c)

⁵ *State v. Noyes*, 47 Me. 189; *Lafayette Plank-Road Co. v. New Albany & Salem Railroad Co.*, 13 Ind. 90.

⁶ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; s. c. 7 Pick. 507; *Lafayette Plank-Road Co. v. New Albany & Salem Railroad Co.*, 13 Ind. 90.

⁷ *Turnpike Co. v. State*, 3 Wal. 210; *Bridge Proprietors v. Hoboken Land & Improvement Co.*, 1 Wal. 116. *Richmond, Fredericksburg, & Potomac Railroad Co. v. Louisa Railroad Co.*, 13 How. 71; s. c. 2 Redf. Am. Railw. Cas., 600. In this case three of the judges dissented, and Mr. Justice CURTIS placed his dissent on the ground, that, the charter being recognized as a contract, it was incumbent on the court to carry into effect its very terms, one of which is, that the legislature will not allow any other railway to be constructed which may be likely to injure the plaintiffs. Where power to make and maintain a bridge over a navigable river which forms the boundary between two coterminous states, and take tolls thereon, has been given by the legislatures of both states, neither state can by its subsequent legislation declare that no other bridge shall be built across such river, within certain limits, and thus render the franchise exclusive. Thus by agreement between New Jersey and Pennsylvania, the Delaware in its whole length and breadth was to remain a common highway, equally open for the use of both states, and each state is to enjoy and exercise concurrent jurisdiction on its waters. Both states concurred in granting the right to erect and maintain a bridge, and to take tolls thereon. The legislature

(c) This has been the settled rule shown by numerous more recent decisions. See *infra*, § 233, note (a).
since the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, as

Hence in one case it was held, that a stipulation in the charter of a railway corporation that the state would not, within thirty *years, allow any other railway to be constructed within certain limits, the probable effect of which would be to diminish the number of a certain description of passengers on the railway then chartered, was not violated by merely chartering another railway which might be used exclusively to transport merchandise; and the state courts decided correctly, in refusing to enjoin the second company from building their road, although if put to the use of transporting passengers it would become an infringement of the exclusive rights of the former company, inasmuch as it did not follow, either from the incorporation of the second company or the erection of their works, that it would be attempted to employ it in the transportation of passengers.⁸ The inviolability of such exclusive grants is maintained in almost all the decisions of the state courts upon this subject,⁹ except when the franchise of the former corporation is taken for public use, as it may be by making compensation.¹⁰

of New Jersey afterwards passed an act declaring that it should not be lawful for any person or persons to make another bridge across the Delaware anywhere within three miles of the complainant's bridge. It was held that even if the act were intended to take effect without the assent of the state of Pennsylvania, it was void, as being in contravention of the agreement. As, under the agreement, neither state, by its sole jurisdiction, had the right to grant the franchise, so neither could lawfully contract to refuse to grant it. *Bridge Co. v. Trenton City Bridge Co.*, 13 N. J. Eq. 46.

⁸ *Richmond, Fredericksburg, & Potomac Railroad Co. v. Louisa Railroad Co.*, *supra*. And see *Bridge Proprietors v. Hoboken Land Co.*, 13 N. J. Eq. 503; s. c. in error, 1 Wal. 116; *Bridge Co. v. Trenton City Bridge Co.*, 13 N. J. Eq. 46; *Akin v. Western Railroad Co.*, 30 Barb. 305.

⁹ *Piscataqua Bridge v. New Hampton Bridge*, 7 N. H. 85; *Enfield Bridge v. Hartford & New Haven Railroad Co.*, 17 Conn. 40; *Washington Bridge v. State*, 18 Conn. 53; *Mohawk Bridge Co. v. Utica & Schenectady Railroad Co.*, 6 Paige, 554; *White River Turnpike Co. v. Vermont Central Railroad Co.*, 21 Vt. 590; *Washington & Baltimore Turnpike Co. v. Baltimore & Ohio Railroad Co.*, 10 Gill & J. 392; *Harvey v. Thomas*, 10 Watts, 63; *Harvey v. Lloyd*, 3 Penn. St. 331; *Shoenberger v. Mulhollan*, 8 Penn. St. 134; *Thompson v. New York & Harlem Railroad Co.*, 3 Sandf. Ch. 625.

¹⁰ *West River Bridge v. Dix*, 6 How. 507, 629; *Pierce v. Somersworth*, 10 N. H. 370; 11 N. H. 20; *Bonaparte v. Camden & Amboy Railroad Co.*, 1 Bald. 205; *Tuckahoe Canal Co. v. Tuckahoe & James River Railroad Co.*, 11 Leigh, 42; *Armington v. Barnet*, 15 Vt. 745; *West River Bridge v. Dix*, 16 Vt. 446; *State v. Noyes*, 47 Me. 187.

5. It seems to be now settled, that where a railway or canal is chartered, with the exclusive grant of the right of transportation between different points, either of goods or passengers or both, this franchise will be equally infringed by the use of different way-lines, so as to constitute a through line of transportation, as by one continuous parallel route. This was so held in an important case in Massachusetts,¹¹ and it has been more recently so held in an important case in the Court of Chancery, New Jersey.¹² But this * will not preclude the separate companies from carrying way freight or passengers. It is only the through transportation which is to be regarded as the exclusive franchise of the through line.¹¹ But this subject received a very elaborate discussion in the case referred to, by a judge of large experience, learning, and ability, and was determined by a court, whose judgments are entitled to the highest consideration by all the co-ordinate or superior tribunals in the country.¹²

* 6. It seems to be now regarded as settled by the supreme national tribunal, that grants made by a state to use the waters of * navigable streams for purposes of manufactures, &c., are in their nature revocable, and that the granting of similar powers to * other corporations for public purposes, is no infringement of the former grant.¹³ * And the grantee of such subsequent grant hav-

¹¹ *Boston & Lowell Railroad Co. v. Salem & Lowell Railroad Co.*, 2 Gray, 1; s. c. 2 Redf. Am. Railw. Cas. 577. Opinion by SHAW, C. J. It was in this case held, that the exclusive right to maintain a railway between Lowell and Boston for thirty years was subject, like other property, to be appropriated for public use, on compensation therefor, whenever in the opinion of the legislature the public exigencies required it. In conclusion, the court say that, although by express grant the legislature, by the exercise of the right of eminent domain, might perhaps have legally authorized defendants to construct and maintain a railway from Lowell to Boston, inasmuch as no express grant to that effect had been made, it must be held that they had no right to establish, by means of junctions with each other, a continuous line of transportation by railway from Lowell to Boston, and that such a connection was making a railway within the meaning of the plaintiff's charter, and was such an infringement as to be a nuisance to plaintiff's rights, for which they are entitled to a remedy. But see *Michigan Central Railroad Co. v. Michigan Southern Railroad Co.*, 4 Mich. 361.

¹² *Delaware & Raritan Canal v. Camden & Atlantic Railroad Co.*, 16 N. J. Eq. 321.

¹³ *Rundle v. Delaware & Raritan Canal Co.*, 14 How. 80; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101.

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ing acquired an absolute right not in any sense limited by the prior grant, it is not * proper to submit the question to the jury whether, without unreasonable expense or undue injury to the second grantee, it might * not have so exercised the franchise as to have avoided the injury to the first grantee.¹⁴ But such a view would seem, at first blush, * to impinge against the free scope of the maxim *sic utere tuo ut alienum non lædas*. And where a railway company obtain a grant for building their road across a navigable stream, provided the navigation be not thereby obstructed, this includes an obstruction caused by the framework and scaffolding used in the course of construction.¹⁵

7. But a provision in the charter of a railway that if the company do not locate their road according to the provisions of the act, they shall forfeit one million of dollars to the state, for the benefit of a particular county, though assented to by the company, does not constitute a case of contract, but one of penalty, subject, as to its enforcement, to the will and pleasure of the legislature.¹⁶

8. Where the legislature reserve the right to repeal the charter of a corporation, if the franchises should be abused or misused, and the legislature exercise the power to repeal, it will be presumed to have been exercised properly, and the act held constitutional, unless the company clearly show that their franchises had not been abused or misused. If the company accept a regrant of * the railway, with enlarged powers, it is thereby estopped to deny the validity of the repealing act. The pendency of judicial proceedings against the company does not suspend the exercise of the repealing power by the legislature. Nor can it alter the nature of the contract growing out of the charter.¹⁷

¹⁴ New York & Erie Railway Co. v. Young, 33 Penn. St. 175.

¹⁵ Memphis & Ohio Railroad Co. v. Hicks, 5 Sneed, 427.

¹⁶ State v. Baltimore & Ohio Railroad Co., 12 Gill & J. 399. It is said in this case, that a contract made by the state, for the benefit of one of its counties, is not within the purview of that provision of the federal constitution which prohibits the states from passing any law impairing the obligation of contracts, so as to hinder the state from releasing the contract, or discontinuing an action brought for its enforcement, in the name of the state.

In this case, in error in the United States Supreme Court, 3 How. 534, it is held, that this was a penalty imposed on the company as a punishment for disobeying the law, and the legislature had the right to remit it.

¹⁷ Erie & Northeast Railroad Co. v. Casey, 26 Penn. St. 287; *infra*, § 242. And where the legislature has reserved the power to modify any charters that

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9. In a case in Louisiana,¹⁸ where the plaintiff's company * were incorporated in 1830, with the exclusive privilege of constructing

it may grant, an act, in its terms applicable to all railways, will affect any railway company whose charter does not contain an express limitation to the contrary. *Bangor, Oldtown, & Milford Railroad Co. v. Smith*, 47 Me. 35. In *State v. Noyes*, 47 Me. 189, it was held that the legislature had not the right to determine whether a corporation has abused or exceeded its powers. Under a power reserved to amend the charter of a corporation, the legislature may impose on the corporation any additional condition or burden connected with the grant which they may deem necessary for the public good, or which they might justly have imposed originally. *English v. New Haven & Northampton Co.*, 32 Conn. 240. And see *Delaware Railroad Co. v. Thorp*, 1 Houst. Del. 149; *State v. Dawson*, 16 Ind. 40; *Atkinson v. Marietta & Cincinnati Railroad Co.*, 15 Ohio St. 21; *Lafayette Plank-Road Co. v. New Albany & Salem Railroad Co.*, 13 Ind. 90; *In re Kerr*, 42 Barb. 119; *People v. Kerr*, 27 N. Y. 188; *Philadelphia & Reading Railroad Co. v. Philadelphia*, 47 Penn. St. 325; *Milhan v. Sharp*, 27 N. Y. 611; *Brooklyn City & Newtown Railroad Co. v. Coney Island & Brooklyn Railroad Co.*, 35 Barb. 364; *Cincinnati & Spring Grove Avenue Street Railroad Co. v. Cumminsville*, 14 Ohio St. 523; *Chenango Bridge Co. v. Binghamton Bridge Co.*, 27 N. Y. 87; s. c. 3 Wal. 51; *Bridge Co. v. Trenton City Bridge Co.*, 13 N. J. Eq. 46; *Bridge Proprietors v. Hoboken Land & Improvement Co.*, 13 N. J. Eq. 81; s. c. 13 N. J. Eq. 503; s. c. 1 Wal. 116; *Sixth Avenue Railroad Co. v. Kerr*, 45 Barb. 138. In *Branson v. Philadelphia*, 47 Penn. St. 359, it was held, that every person holding license from a public authority exercising the whole or a portion of the right of eminent domain, necessarily takes it subject to the exercise of this right whenever required by the public good. See also *Akin v. Western Railroad Co.*, 30 Barb. 305.

¹⁸ *Pontchartrain Railroad Co. v. New Orleans & Carrollton Railroad Co.*, 11 La. An. 253. The court profess to base their opinion on the case of the *Boston & Lowell Railroad Co. v. Salem & Lowell Railroad Co.*, 2 Gray, 1.

The rule of decision in regard to the constitutionality of the enactments of the state legislatures, and indeed of the national legislature, is so familiar as scarcely to justify its repetition. Such acts are not ordinarily declared unconstitutional, unless for some obvious conflict with the very terms of the constitution itself, or some manifest violation of the acknowledged principles of legislative authority; and never on the basis of any undefined theory of the wisdom or justice of the enactment, or of the class of enactments to which it belongs. See *Calder v. Bull*, 3 Dall. 386; *Satterlee v. Matthewson*, 2 Pet. 380; *Sharpless v. Philadelphia*, 21 Penn. St. 147.

In *Lumsden v. Milwaukee*, 8 Wis. 485; s. c. 6 Am. Law Reg. 157, under the 11th article of the constitution of Wisconsin, which provides that "no municipal corporation shall take private property for public uses, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury," it was held that a city charter, which authorized the judge of the circuit or county court, where land was proposed to be taken for public use, to appoint twelve jurors to view the ground, determine the necessity of the

and using a railway leading to and from the city of New * Orleans, and to and from Lake Pontchartrain; and in 1833 the New Orleans & Carrollton Railway was incorporated for the construction of a railway from New Orleans to Carrollton; and in 1840 the Jefferson & Lake Pontchartrain Railway was incorporated for the construction of a railway from Carrollton to Lake Pontchartrain; and the two last-named companies entered into an

taking, and assess the damages therefor, but did not in express terms require that the jury should be sworn, or provide any mode for swearing them, was unconstitutional, and the proceedings under it void, though the jury may have been in fact sworn. This case, upon the report of it, presents a remarkable departure from the usual rule of construction. There seems to have been a studious effort, by construction, to raise a conflict between the statute and the constitution; while the ordinary rule of construction undoubtedly is, to avoid such conflict, when it can fairly be done. It would seem, not only that the duty of swearing the jury should have been implied, from the due course of such proceedings, but that even if the act had provided, in terms, that the jury should not be sworn, it was still so much mere matter of form that it ought not to have been held fatal, there being no express provision in the constitution that the jury should be sworn.

In *Ferguson v. Miners' & Manufacturers' Bank*, 3 Sneed, 609, it was attempted to escape from the force of an act of the legislature, on the ground that its passage was obtained by imposition and fraud, without the majority of the legislature being made aware of the extent of the bill, and that this was done by design, through the instrumentality of certain members of the legislature. The court declined to recognize the validity of such grounds of impeachment. And the same view of the law seems to be maintained by MARSHALL, C. J., in *Fletcher v. Peck*, 6 Cranch, 87. See also, as to the interpretation of provisions in the charter of a corporation affecting public rights, *State v. Passaic Turnpike Co.*, 3 Dutcher, 217, where, under a provision that "no gate or turnpike shall be erected in any part of a highway which has heretofore been used as such," it was held, that when the ancient highway had been vacated, and the right of the public over a certain part terminated, the prohibition against the erection of a gate at that place also ceased.

And when a bridge company, claiming an exclusive right within certain limits, asks an injunction to prohibit the building of another bridge within such limits, a court of equity will not lend its aid when it appears from the answer that the bridge of the complainants has been so far appropriated to the purposes of a railway as to render it inconvenient and dangerous for ordinary travel. *Bridge Co. v. Trenton City Bridge Co.*, 18 N. J. Eq. 46.

In *Akin v. Western Railroad Co.*, 30 Barb. 305, it was held, that the carrying of passengers across the river between Albany and Greenbush, free of charge, by the Western Railroad Company on its ferry-boats, was not a violation of a grant from the corporation of Albany, of the exclusive right of ferriage for the term of twelve years.

arrangement, by which "through" trains were run from New Orleans to the lake, the plaintiffs asked for an injunction against the defendants; it was held, that the grant of another railway from New Orleans to Lake Pontchartrain would have been an infringement of the privileges granted to the plaintiffs by their act of incorporation, and that the legislature could no more grant the power to two or more companies than it could to one.

It is further said, that, if the object of the two companies was in good faith to accommodate different lines of travel and trade, and not to engross that which would naturally pass over the plaintiffs' road, it would be lawful, although incidentally it might sometimes divert travel or traffic from plaintiffs' road. But if the union of the two roads was made for the purpose of transporting freight and passengers to and from the prohibited points, it could not be vindicated.

It is further said, that, although defendants' acts of incorporation were not unconstitutional in themselves, the moment the roads are connected, so as to form a continuous line of railway between the two prohibited points, they become so, as far as concerns the direct travel between the two points, as much as a single act of incorporation, direct from one point to the other, would have been. This seems an exceedingly sensible view of the subject, and one which cannot fail to commend itself to practical men.

10. The more recent decisions of the national tribunal of ultimate resort upon questions of exclusive grants render it more difficult than formerly to anticipate precisely what may be hereafter regarded as the only safe basis upon which to predicate such a claim. In one of the latest reported decisions of that court,¹⁹ the opinion by Mr. Justice NELSON seems to recognize *the old foundations, that any such claim must rest either upon an exclusive grant in terms, or by clear implication, and that all reasonable intendments will be made against any such exclusive grant. And the same view is maintained in the dissenting opinion of Mr. Justice GRIER in the Binghamton Bridge case,²⁰ which is concurred in by two of the other judges. And this is the ground upon which that case is placed by the Court of Appeals in New York.²¹

¹⁹ Turnpike Co. v. Maryland, 3 Wal. 210.

²⁰ 3 Wal. 51.

²¹ 27 N. Y. 87.

11. But the decision of the majority of the court in the Binghamton Bridge case seems to us to be putting all the former decisions of the court upon this point at utter defiance, and to erect a platform for exclusive privileges and grants, which, without much enlargement, might be made to carry safely almost any claim of the kind. For it seems impossible to argue that there was any express exclusive grant in that case, or that one could be fairly implied except by the most liberal construction. (*d*) But we have no great apprehension that the decision will hereafter be regarded as a safe precedent.

12. The cases which have occurred in the state courts since the former edition, bearing upon this point, are considerably numerous, but not of the greatest interest.

The question has been somewhat discussed in New Jersey in regard to bridges across the river Delaware. But these questions²² are so much affected by compacts between the adjoining states as not to be of any special interest to the profession generally. It was decided, in the case last cited, that where one bridge company sets up a claim of exclusive right, within certain limits, and seeks for an injunction prohibiting the building of another bridge within those limits, a court of equity will not lend its assistance when it appears from the answer of the defendants that the plaintiffs' bridge has been so far appropriated to the uses

²² Bridge Co. v. Trenton City Bridge Co., 13 N. J. Eq. 46.

(*d*) The provision of the charter was that it should not be lawful "for any person or persons" to interfere with the privilege thereby conferred, — the privilege, i. e., of taking tolls on a bridge, to be exclusive of other bridges within a certain distance. The court held, and not without some show of reason, that the provision meant not merely that the privilege should not be interfered with without authority, but that the state should not confer authority. It is not clear upon any other construction, that the exclusiveness of the privilege would be of any great value, as the difficulties in the way of procuring legislative authority in such cases, the legisla-

ture not being bound by contract not to confer it, are, in general, not altogether insurmountable. But whatever may be said of the soundness of the reasoning on which this decision rests, the decision should not be taken as manifesting any intention either to limit or to abandon the general rule (referred to, *supra*, pl. 4, and fully considered *infra*, § 233), that public grants are to be construed strictly in favor of the public, and that nothing is to pass except by express words or necessary implication. This is still the rule as it was in the time of Charles River Bridge v. Warren Bridge. See *infra*, § 233.

of a railway as to render it inconvenient and dangerous for ordinary travel.²³

The erection of a railway bridge for the passage of persons only in the cars of the company, is no infringement of the exclusive privileges of an existing bridge for ordinary travel.²³ It is * declared in these cases that no structure across a river could be regarded as a bridge, within the fair construction of the plaintiffs' charter, unless it had a foot-way for man and beast to pass on. The cases are reviewed, and this is here shown to be the common-law definition of a bridge across rivers.

13. The conflicting rights of different grantees along the shores of tide-waters are discussed in a recent case in New York.²⁴

14. The constitutional prohibition against the states "passing any law impairing the obligation of contracts" does not extend to a judicial decision declaring a contract void on the ground that the parties had no legal or constitutional power to make it.²⁵ (e)

15. The provision in the acts creating the Baltimore & Ohio Railway and its branch to Washington, that it shall pay the state one-fifth of the passenger fares between Baltimore and Washington, is not a capitation tax or one regulating commerce among the states.²⁶

²³ *Bridge Proprietors v. Hoboken Land & Improvement Co.*, 13 N. J. Eq. 81; s. c. 13 N. J. Eq. 503; s. c. 1 Wal. 116; *supra*, note 18.

²⁴ *Taylor v. Brookman*, 45 Barb. 106.

²⁵ *McClure v. Owen*, 26 Iowa, 243.

²⁶ *State v. Baltimore & Ohio Railroad Co.*, 34 Md. 344.

(e) But see *supra*, note (a).

SECTION II.

Power of Legislature to impose Restrictions on existing Corporations.

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| 1. Railway companies subject to legislative regulation in matters of police.
2, 3. Extent of legislative control for such purposes discussed.
4. Extent of a reserved power to repeal charters of corporations.
5. Charter expressly exempt from legislative control. | 6. Effect of public patronage upon the right to legislative control.
7. Railway companies may be compelled to modify their works.
8. Summary remedies given to a corporation no part of its franchises.
9. Statutes to compensate for animals killed apply to existing as well as to future companies. |
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§ 232. 1. The power of the legislature to impose new burdens, restrictions, or limitations upon existing corporations, is one of some difficulty. There are confessedly certain essential franchises of such corporations, which are not subject to legislative control; and at the same time it cannot be doubted that these artificial beings or persons, the creations of the law, are equally subject to legislative control, and in the same particulars precisely, as natural persons.¹ (a) Railways, so far as the regulation of their own

¹ Although a charter to a corporation is a contract, the obligation of which cannot be impaired by subsequent legislation, corporations, like natural persons, are subject to remedial legislation and amenable to general laws. *Coffin v. Rich*, 45 Me. 507. When a private corporation, doing business in the city, creates in the course of its business a nuisance which causes injury to the property of a citizen, such corporation will be responsible therefor in an action, notwithstanding such city may have attempted to authorize the acts which caused the nuisance. *Terre Haute Gas Co. v. Teel*, 20 Ind. 131.

(a) And charter contracts, notwithstanding the protection afforded by the federal constitution, are always subject to the implied reserved right of legislative control for the protection of the lives, health, and property of citizens, and the preservation of order and the public morals. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Stone v.*

Mississippi, 101 U. S. 814; *Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co.*, 111 U. S. 746.

The right to control to some extent the charges which railway companies shall make for the transportation of freight or passengers is considered elsewhere.

police affecting the public safety, both as to life and * property, and also the general police power of the state, as to their unreasonable disturbance of and interference with other rights, either by noise of their engines in places of public concourse, as the streets of a city, or damage to property, either in public streets and highways or escaping from the adjoining fields, there can be no question whatever, are subject to the right of legislative control.² (b)

2. And this right extends not only to the matters enumerated, but to an infinite variety of other matters coming into the same general description of the public police, and the police of the railways ; of the importance or necessity of which the legislature must be the judge.³

² In *State v. Noyes*, 47 Me. 189, it was held that private corporations, without any express reservation of the powers over them by the legislature in their charter, are subject, like individuals, to be restrained, limited, and controlled in the exercise of their powers by such laws as the legislature may pass, based on the principles of safety to the public. But police regulations established by the legislature for the mere convenience of the public or of travellers on a railway, cannot be upheld against individuals or private corporations. Police regulations imposed on a corporation in violation of the rights secured to such corporation by its charter are not binding upon it. *Ib.* See *State v. Jersey City*, 29 N. J. Law, 170.

³ *Boston, Concord, & Montreal Railroad Co. v. State*, 32 N. H. 215, where it is held that the legislature may subject existing railway companies to indictment for negligence causing the death of any person. In *Thorpe v. Rutland & Burlington Railroad Co.*, 27 Vt. 140, the subject is very extensively examined. See s. c. 2 Redf. Am. Railw. Cas. 587. It is held in *Pennsylvania Railroad Co. v. Riblet*, 66 Penn. St. 164, that an act of the legislature requiring existing railways, as well as those thereafter created, to maintain fences, is constitutional, as coming within the police power of the state.

The same rule is adopted in *Bulkley v. New York & New Haven Railroad Co.*, 27 Conn. 479. See also *Connecticut & Passumpsic Rivers Railroad Co. v. Holton*, 32 Vt. 43. And a clause giving to a railway company the fee-simple in the

(b) This general right is vindicated by a great number of statutes on a variety of subjects, — fences, crossings, signals, &c., — now in force and unquestioned in all the states of the Union. What regulations are to be considered police regulations is in general plain enough. But some regulations have been considered such which at first blush would appear to fall in another category. Thus, a statute requiring railway companies to post and keep posted printed schedules of their rates for transportation, has been held a police regulation, and not a regulation of commerce. *Chicago & Northwestern Railway Co. v. Fuller*, 17 Wal. 560.

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* 3. There is an early case in Maryland,⁴ where the legislature, by special statute, enabled the defendants to issue bonds for the

track and the exclusive use and occupation of the same, and providing that no person or body politic or corporate should interfere therewith or do anything to detract from the profits of the company, will not exempt such company from the operations of the statute making railway companies liable for cattle killed on the track. *Indianapolis & Cincinnati Railroad Co. v. Kercheval*, 16 Ind. 84. And see *Judson v. New York & New Haven Railroad Co.*, 29 Conn. 434, 438, opinion of the court; *Ohio & Mississippi Railroad Co. v. McClelland*, 25 Ill. 140; *Grannahan v. Hannibal & St. Joseph Railroad Co.*, 30 Mo. 546. On the same principle it is said in *Galena & Chicago Union Railroad Co. v. Dill*, 22 Ill. 264, that an act exempting a railway company from ringing a bell or sounding a whistle at a street-crossing, is not unconstitutional. See also *Veazie v. Mayo*, 45 Me. 560; *Bulkley v. New York & New Haven Railroad Co.*, 27 Conn. 479; *New Albany & Salem Railroad Co. v. Maiden*, 12 Ind. 10; *Indianapolis & Cincinnati Railroad Co. v. McAhren*, 12 Ind. 552. The last-mentioned cases hold that the statute requiring railways to be fenced is in the nature of a police regulation, and could therefore be enacted after the incorporation of the road.

The power of the legislature to impose new burdens depends, of course, on the inquiry whether the burden will impair the essential obligation of the contract in the charter of the corporation. *Washington Bridge Co. v. State*, 18 Conn. 53. Thus, in this case, the plaintiffs had a grant to build a bridge over the Housatonic River, in 1802, and, by additional acts, in 1808, the grant was made exclusive for six miles on the river, provided that nothing contained in the grant should be construed to impair the rights of persons navigating the river. The company built the bridge, and kept it in repair according to the terms of the charter until 1845, when the legislature passed a resolve requiring them to construct a draw, so as to admit the free and easy passage of all registered or licensed vessels, and the act specified a certain time when the draw should be complete, and that certain commissioners should accept the same, and also gave owners of vessels delayed or detained by the insufficiency of the draw, right to damages. The resolve further provided that plaintiffs should be deprived of their power to take their tolls, as formerly, until the draw should be completed, and accepted as aforesaid. Plaintiffs having failed to comply with the resolve, on an information in the nature of a *quo warranto*, alleging delays to vessels, &c., it was held that the resolve of 1845 was not binding on the bridge company, no reservation being made in the former acts and resolves of power to vary or impose new burdens on the corporation without its consent. See also *Commonwealth v. Cullen*, 13 Penn. St. 133; *Bailey v. Philadelphia, Wilmington, & Baltimore Railroad Co.*, 4 Harring. Del. 389. In the last case the company was authorized to build a bridge across a navigable stream, which would obstruct navigation therein, and a subsequent act was passed giving a right of action in cases of obstructions, which the company did not accept, and it was held void. But as long as no rights become vested,

⁴ *McCullough v. Annapolis & Elk Ridge Railroad Co.*, 4 Gill, 58.

payment * of their debts, providing that the interest should be paid out of a certain fund designated in the act for that purpose, the

i. e., before the company goes into operation, for instance, the charter of a corporation is declared to be subject to the same legislative control as other statutes. *Covington & Lexington Railroad Co. v. Kenton Co.*, 12 B. Monr. 144; 2 B. Monr. 402; *Beekman v. Saratoga & Schenectady Railroad Co.*, 3 Paige, 45; *Baltimore & Susquehanna Railroad Co. v. Nesbit*, 10 How. 395; where it is held, that until the title to lands which are in process of condemnation for the purposes of a railway, becomes actually vested in the company, the legislature may change the mode of appraisal, no rights having as yet vested. Acts of the legislature imposing penalties on a railway for violating the provisions of its charter in regard to fares, are valid. *Camden & Amboy Railroad Co. v. Briggs*, 2 N. J. 623. See also *Roxbury v. Boston & Providence Railroad Co.*, 6 Cush. 424; *Madison & Indianapolis Railroad Co. v. Whiteneck*, 8 Ind. 217. But where the statute imposes a penalty of fifty dollars on railway companies taking more than legal fare, the passenger can recover only one penalty for all acts of the kind committed before the bringing of the action. But it will not preclude the recovery, that the party was riding at the time for the purpose of obtaining evidence to maintain the action. *Fisher v. New York Central & Hudson River Railroad Co.*, 46 N. Y. 644.

In some cases in Kentucky, the subject of the inviolability of corporate franchises is much discussed. In *Louisville v. University*, 15 B. Monr. 642, it was held, that a grant of land by the city to the university was an inviolable contract, both as to the city and the state; that the state had no control over the property or other essential franchises of corporations, not strictly municipal; and that even municipal corporations might hold property independent of state control, in all cases where it was not held in trust for public purposes, under the supervision of the state. And in a case in Maine, it was held that an act, general in its terms and applicable to all railways, is within the meaning of the act of 1831, c. 503, empowering the legislature to modify the charters of corporations; and such act affects the charter of any railway company which contains no express limitations to the contrary, and this, though the provisions contained in the act are dissimilar to those of the act of incorporation. *Bangor, Oldtown, & Milford Railroad Co. v. Smith*, 47 Me. 34.

And in *Sage v. Dillard*, 15 B. Monr. 340, it is held, that a reservation in a legislative charter of the power to alter, repeal, or amend the same, does not imply the power to alter the vested rights acquired by the corporators under the charter, and to add new parties and managers without the consent of the corporators. But in *Monongahela Navigation Co. v. Coon*, 6 Penn. St. 379, it was held to be competent, under a similar reservation, in an amendment to the charter of a corporation accepted by the company, for the legislature to create a remedy against the corporation for damages already done.

And in *Norris v. Androscoggin Railroad Co.*, 39 Me. 273, it was held, that a general statute subjecting railways which were required to fence their roads to a penalty of one hundred dollars for each month's delay, after certain steps had been taken by the land-owners, as it was a "remedial statute, passed for

principal * being irredeemable for thirty years, and it was provided that the amount of A.'s claim should be determined by B.; and it was * held that it was not competent for the legislature to provide, by subsequent statute, for referring A.'s claim to other arbitrators * than the one named in the first act, and making it a charge on the same fund, without the consent of the other creditors.

* 4. Under the usual legislative reservation of the power to alter, modify, or repeal the charter of a railway company. (c) it has been * considered that the legislature cannot impose pecuniary burdens upon the company of a character different from any others in the * charter, — as requiring them to cause a proposed

the effectual protection of property peculiarly exposed by the introduction of the locomotive engine, applied to corporations existing before its passage." *Lyman v. Boston & Worcester Railroad Co.*, 4 Cush. 288.

So a statute appointing commissioners to fix the compensation which shall be paid for drawing passengers of another company over its road, is no infringement of the rights secured in its charter for regulating tolls on its road. *Vermont & Massachusetts Railroad Co. v. Fitchburg Railroad Co.*, 9 Cush. 369. So also it was held, in *Staats v. Hudson River Railroad Co.*, 40 N. Y. 196, that the general statute of 1850, requiring railways to maintain, along the sides of their roads, fences, with openings or gates or bars therein, for the use of adjoining proprietors, was not in conflict with the special charter of the defendant, whereby adjoining land-owners were allowed to maintain gates or bars in the fences along the lines of their land; as this imposed no duty of making such openings, but left it entirely optional, this latter being for the accommodation of the land-owners, and the former a police regulation for the security of travellers generally. And where the charter of a manufacturing corporation, or the general laws of the state, give the legislature power to amend, alter, or repeal the same, or any of its provisions, the legislature may impose any additional burden on the company, such as maintaining fishways, when the same will not defeat the essential purpose of the grant. *Fisheries Commissioners v. Holyoke Water Power Co.*, 104 Mass. 446. So, too, a railway company under similar conditions may lawfully be required by the legislature to erect and maintain such a station, at a prescribed point on its road, as in the judgment of commissioners appointed by the court shall be reasonably commodious. *Commissioners v. Eastern Railroad Co.*, 103 Mass. 254.

See also *Baker v. Boston*, 12 Pick. 184, 194; *Vanderbilt v. Adams*, 7 Cow. 349; *State v. Kirkwood*, 14 Iowa, 162; *supra*, § 78, pl. 4.

(c) This reservation of a right to alter, &c., has none of the characteristics of a mere power, which, once exercised, is exhausted. A charter containing such a reservation may be modified, or finally withdrawn, at any time at the will of the legislature. *New Jersey v. Railroad Taxation Commissioner*, 37 N. J. Law, 228. See further, as to such reservations, *supra*, § 231, note (b).

new street or highway to be taken across their track, and to cause the necessary excavations, * embankments, and other work to be done at their own expense.⁵

* 5. And where the charter of a railway company expressly exempts it from legislative control, the legislature may nevertheless * subject the company, by a general law applicable to all railway companies, to the duty of paying laborers upon its works whose wages are in arrear and not paid by the contractors.⁶

* In a case in the state of Michigan, where the charter of a railway contained an express stipulation that no other railway * crossing within certain prescribed distances of the route of the first grant should ever be chartered by the legislature, it was held to apply only to one continuous road connecting the prohibited points, and not to separate roads, one of which should start from or reach one of the prohibited points, and others start from or reach other prohibited points, although all the several roads so granted, when combined, would constitute a continuous route through the points prohibited.⁷

⁵ *Miller v. New York & Erie Railroad Co.*, 21 Barb. 513. *In re Gibson*, 21 N. Y. 9, the court intimate that under such a reservation the charter may be revoked or altered by a change in the constitution of the state as well as by legislative action. See also *Morris & Essex Railroad Co. v. Miller*, 2 Vroom, 521; *Pennsylvania College Cases*, 13 Wal. 190.

⁶ *Peters v. Iron Mountain Railroad Co.*, 23 Mo. 107, 111. And they may be required to fence their track as a public duty, but not for the benefit of the adjoining proprietors, perhaps. *New Albany & Salem Railroad Co. v. McNamara*, 11 Ind. 543. Statutes requiring the party in interest to sue, and regulating the form of giving notice to corporations, affect only the mode of process, and are valid as to existing corporations. *New Albany & Salem Railroad Co. v. McNamara*, *supra*; *Hancock v. Ritchie*, 11 Ind. 48.

In New York, where the statute requires the officer having charge of the letting of the canals or other public works of the state, to take a bond, with sureties, conditioned that the contractor shall pay in full, at least once in each month, "all laborers employed by him," it was held that such bond does not extend to laborers employed by sub-contractors. Nor will it make any difference in the construction of the bond, that the contract prohibits the contractor from subletting the work, that the sub-contract was without the consent of the officers having the superintendence of the work, and that the work done by the laborers under the sub-contractor was estimated under the original contractor, the same as if done by laborers in his employ. *Supra*, § 141, pl. 5.

⁷ *Michigan Central Railroad Co. v. Michigan Southern Railroad Co.*, 4 Mich. 361. If this case is correctly stated, it seems to be in conflict with the prevailing doctrines. Two of the judges dissented on that ground.

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6. As many private railway companies in this country have been sustained, to a great extent, by public patronage in the form of legislative grants, either state or national, in lands or by way of loans, subscriptions to stock, guaranty of securities, or otherwise, the question of the consequent right of legislative interference will be likely to arise hereafter in different forms and upon various grounds or pretexts. The general question is undoubtedly one of interest and importance; and as it has hitherto arisen chiefly in regard to private eleemosynary corporations whose functions and duties are public and whose funds have often been derived from public grants, it may not be altogether inappropriate here to refer to some of the cases which have arisen in that connection, as the question of the right of legislative control is substantially the same there as in the case of railway corporations, and the reason and ground of the claim very analogous.⁸

* 7. It was decided in one case⁹ in Connecticut, that a corporation empowered to build a railway terminating in the city of New Haven, provided that, in constructing their road within the city,

⁸ The distinction between the inviolability of the rights and immunities attaching to public and private corporations is extensively discussed in *Tinsman v. Belvidere Delaware Railroad Co.*, 2 Dutcher, 148. It is there held, that railway corporations are strictly private, although performing many important public functions, and invested with prerogative franchises, to a certain extent, so far as the construction of their works is concerned, but that these companies do not possess the same immunity from liability to make compensation for private damage, caused by the construction and operation of their works, which would attach to persons in the execution of a strictly public trust for the public benefit. It is considered that these companies' works, being constructed by private capital for private emolument, the companies must be subject to the ordinary liability of private persons, for all such acts as are not expressly, or by necessary implication, conceded to them by charter. It is said here, that public corporations are such only as are created for political purposes, to carry forward the functions of the state; over public corporations the legislature have an unlimited control, to create, modify, or destroy, at pleasure, but the grant and acceptance of a private charter is a compact which the legislature cannot violate; the liability of the corporation for damages does not depend on whether it is public or private, but whether the franchise is created for private emolument or exclusively for the public good. *Supra*, § 73, pl. 2, and notes. But an incorporated academy, whose endowment comes exclusively from the state, has been held subject to legislative control. *Dart v. Houston*, 22 Ga. 506. And see opinion in the case of *Trinity Church*, in 1 Redf. Am. Railw. Cas. 513.

⁹ *English v. New Haven & Northampton Co.*, 32 Conn. 240.

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the company should be subject to such regulations as the Common Council should prescribe, after they had constructed their road and built bridges over the same within the city to the acceptance of the city, and where subsequently the legislature had by statute empowered the Common Council to order the bridges widened in such a manner as public convenience might require, and to enforce such order, that the act was not unconstitutional, either as impairing the obligation of contracts or taking private property for public use without compensation. The decision is placed mainly upon the ground that the legislature retained by express reservation the right to amend or repeal the charter of this company. But it seems to us, upon general grounds, that the statute in question was nothing more than the exercise of ordinary legislative powers in maintaining the police of the state. It is here said that the Common Council of the city had no such interest in the question as disqualified them to act.

8. In one case ¹⁰ it was held, that a summary remedy against defaulting stockholders, given by the charter of a corporation, is * no part of the corporate franchise, and may be subsequently modified by the legislature.

9. And it has been held, that a statute providing compensation to the owners of animals killed or injured on railways by the passing trains, is so far in the nature of general police regulations as to come within the legitimate range of legislative action, and is equally binding upon existing corporations as upon those subsequently created.¹¹ (*d*)

And a statute giving the representatives of persons killed a right of action to the same extent they would have had if in life is no violation of the charter of railways before incorporated.¹²

¹⁰ *Ex parte* Northeast & Southwest Alabama Railroad Co., 37 Ala. 679.

¹¹ *Indianapolis & Cincinnati Railroad Co. v. Kercheval*, 16 Ind. 84. This question is here considerably discussed with reference to the effect of such enactments subsequent to the creation of the corporation.

¹² *Southwestern Railroad Co. v. Paulk*, 24 Ga. 356. See also *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120. So an act of the state legislature giving an additional remedy on a railway mortgage is no infringement of the federal constitution. *McElrath v. Pittsburg & Steubenville Railroad Co.*, 55 Penn. St. 189.

(*d*) See *Atchison & Nebraska Railroad Co. v. Harper*, 19 Kan. 529.
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But it has been held that a statute allowing the gates of a plank-road company to be thrown open, upon the report of commissioners that it was out of repair, was unconstitutional.¹²

SECTION III.

Construction of exclusive Railway Grants.

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| <ol style="list-style-type: none"> 1. Such grants strictly construed against the company and in favor of the public. 2. Nothing passes by implication that is not necessary to enjoyment of what is granted expressly. 3. Ambiguous terms construed most strongly against the company. | <ol style="list-style-type: none"> 4. Statutes conferring powers for the public benefit more liberally construed than those conferring powers for private profit. 5. Legislature may remedy defects in organization. |
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§ 233. 1. The principle that exclusive grants, in derogation of common right, are to be strictly construed, is a principle of statutory exposition and construction as old almost as the English common law. (a) And it has received frequent applications to railway charters, and especially in regard to those exclusive grants by which subsequent similar incorporations are prohibited.¹ It

¹² *Powell v. Sammons*, 31 Ala. 552. But this seems a questionable decision.

¹ *Bradley v. New York & New Haven Railroad Co.*, 21 Conn. 294; *Boston & Lowell Railroad Co. v. Andover & Wilmington Railroad Co.*, 5 Cush. 375; *Brocket v. Ohio & Pennsylvania Railroad Co.*, 14 Penn. St. 241; 6 Paige, 554. And the same doctrine has been maintained in the Supreme Federal Court. *Rice v. Railroad Co.*, 1 Black, 358; *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

(a) The dissent (STORY, THOMPSON, and McLEAN, JJ.) in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, would seem to indicate that the rule there affirmed was not, at the time of that decision, altogether beyond question; but from *Augusta Bank v. Earle*, 13 Pet. 519; *Mills v. St. Clair County*, 8 How. 569; *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. 172; *Fanning v. Gregorie*, 16 How. 524; *Minturn v. Larue*, 23 How. 435; *Rice v. Minnesota & Northwest-ern Railroad Co.*, 1 Black, 358; *Thomas v. West Jersey Railroad Co.*, 101 U. S. 71, and the cases cited *supra*, § 231, note 7, in which the principle is directly adjudged, and the cases *passim* in which it is recognized, it is clear that it has been acknowledged and acted on from time to time from an early day, and that it is to be regarded as the settled rule that nothing passes by a public grant except by express words or necessary implication. See *supra*, § 231, note (c).

was *held, that where a railway charter gave the company "authority to vary the route and change the location after the first selection had been made, whenever a cheaper and better route could be had, or whenever any obstacle to the location was found, either by difficulty of construction or procuring right of way at reasonable costs, that authority was not thereby conferred upon the company to relocate their road after it was finished."²

2. So, too, a stipulation in the charter of a railway that no other one shall be granted from one terminus to any place within five miles of the other terminus, is not violated by the grant of a railway from one terminus of the former one to a point coming within the space included by two straight lines drawn from the former terminus of the first road to points five miles distant from the other terminus, upon opposite sides but not within five miles of the actual terminus of the first road.³ But although a railway company cannot ordinarily claim an extension of its franchises by implication, it does take by implication such powers as are indispensable to the enjoyment of those expressly granted.⁴ (b)

* *Moorhead v. Little Miami Railroad Co.*, 17 Ohio, 340. In *Milnor v. New Jersey Railroad Co.*, 6 Am. Law Reg. 6, it was decided that the mere establishment of a particular line of road and erection of a bridge in a particular location, in a town, by a railway company, after a controversy with the inhabitants with respect thereto, does not amount to a contract so as to preclude the company, after a lapse of time, from changing the direction of its line and the position of the bridge. See, on this point, *Glover v. Powell*, 2 Stock. 211; *supra*, § 78, pl. 4.

* *Boston & Lowell Railroad Co. v. Andover & Wilmington Railroad Co.*, 5 Cush. 375. And a like principle of construction was adopted in the case of *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210. It was here held, that a legislative provision that the ferries between Hartford and East Hartford should be discontinued, and said towns never afterwards permitted to transport passengers across the river, meant only that the then existing ferries should be discontinued, and the towns not allowed to revive them, and was not abrogated by the establishment of a ferry between those same towns, but accommodating a different line of travel from that which naturally flowed to the bridge.

⁴ *Enfield Toll-Bridge Co. v. Hartford & New Haven Railroad Co.*, 17 Conn. 454; *Springfield v. Connecticut River Railroad Co.*, 4 Cush. 63; *White River Turnpike Co. v. Vermont Central Railroad Co.*, 21 Vt. 590; *State v. Balti-*

(b) And such powers pass, in the language of the courts, by necessary implication. See *supra*, note (a).

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* 3. And the same rule applies to the grant of lands for the purpose of a railway, even where the necessary use should involve the extension of ditches upon other lands of the grantor.⁵ And ambiguous words are to be construed most strongly against the company.⁶ (c) But the right to take lands or the right of way required for the purpose of constructing the road, must include land for stations and other necessary works connected with the operation of the road.⁷

4. The construction of statutes conferring powers upon a corporation for the benefit of the community, should be much more enlarged and liberal, for the purpose of accomplishing the general object proposed, than where powers are conferred upon a private corporation for purposes of trade and business for profit, and in derogation of the rights of those whose property or business is affected thereby.⁸ Hence where the statute gave the Metropolitan Board of Works power to carry sewers into, through, or under any land, subject only to making compensation for any damages done, it was held the board could not, under the Land Clauses Consolidation Act, be compelled to purchase the land or any easement therein.⁸

5. It has been held that the legislature have such power over corporations that they may remedy any defect in their organization.⁹

more & Ohio Railroad Co., 6 Gill, 363. In this case it was held, that the directors being the sole judges of the propriety and the means of declaring dividends, could not lawfully declare a money dividend of \$3 to all stockholders of less than fifty shares each, and \$1 in money and \$2 in the bonds of the company to those having more than fifty shares. But a right of ferry which is optional with the grantee, and may be discontinued by him at any moment, and exists only on Sundays, is not to be regarded as an ancient ferry, as the ground of enjoining others of a similar character. *Letton v. Goodden*, Law Rep. 2 Eq. Cas. 123.

⁵ *Babcock v. Western Railroad Co.*, 9 Met. 553.

⁶ *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. 172; *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

⁷ *Nashville & Chattanooga Railroad Co. v. Cowardin*, 11 Humph. 348.

⁸ *North London Railroad Co. v. Metropolitan Board of Works*, 1 Johns. Ch. Eng. 405; s. c. 5 Jur. N. S. 1121.

⁹ *Illinois Grand Trunk Railroad Co. v. Cook*, 29 Ill. 287.

(c) So in grant of powers in a charter. If, on a reasonable interpretation of the charter, it be fairly doubtful whether a power burden- some to the public has been granted, the power cannot be exercised. *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. 172.

SECTION IV.

Discrimination as to Freight.

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| 1. Discrimination between local freight and freight from without the state not prohibited.
2. Tax on the tonnage of railways brought from other states valid. | * (a). So of tax on gross receipts, though in part derived from interstate transportation.
3. Tax on passengers going out of the state unconstitutional. |
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§ 233 *a*. 1. The constitution of the United States does not prohibit a discrimination between local freight and that which * comes from another state; the distinction, not being personal, is not within the prohibition.¹ (*a*) This decision seems to go solely upon the ground of the rights of citizens in one state having the rights of citizens in all the states. But a discrimination in freight, made expressly on the ground of the residence of the consignor or owner, would unquestionably be sufficiently personal to come within the prohibition of the United States Constitution.

2. There has been some question made in regard to one state having the power to tax the tonnage of railways coming from other states. There is an able and learned opinion of the Common Pleas of Dauphin county, Pennsylvania, by Judge PEARSON, upon the question, in which he declares that the Pennsylvania statute does not come within the prohibition of the United States Constitution; it being only a legitimate mode of taxing the business and profits of railway companies.² (*b*)

¹ *Shipper v. Philadelphia Railroad Co.*, 47 Penn. St. 338.

² That portion of the opinion bearing on this point affords a valuable commentary on the law affecting these questions of taxation.

(*a*) A city ordinance, therefore, laying a license tax on all express companies doing business in the city whose business extends beyond the limits of the state, a smaller tax on companies doing business within the state, and a still smaller one on companies doing business within the city, is not invalid. *Osborne v. Mobile*, 16 Wal. 479.

(*b*) And a statute taxing the gross receipts of a company is not within the inhibition of the constitution, although such receipts are in part derived from interstate transportation. *Reading Railroad Co. v. Pennsylvania*, 15 Wal. 284; *Baltimore & Ohio Railroad Co. v. Maryland*, 21 Wal. 456.

3. But the United States Supreme Court have recently held that a special tax on railway and stage companies for every passenger carried out of the state by them is a tax on the passenger for the privilege of passing out of the state by the ordinary modes of travel, not a simple tax on the business of the companies, and is unconstitutional and void.³

SECTION V.

Power of Congress to regulate Interstate Traffic on Railways.

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| <ol style="list-style-type: none"> 1. Natural import and construction of the terms. 2. Power not restricted to the existing modes of transportation. 3. Commerce embraces all the intercourse among nations or states; the means and appliances of trade, &c. 4. Railway traffic, extending beyond the limits of a state, subject to the control of Congress. 5. Review of decisions of the federal | <ol style="list-style-type: none"> courts. Regulation of commerce extends to waters in fact navigable. 6. Exceptions to the power of Congress to regulate commerce. 7, 8. Control by Congress of interstate traffic on railways a necessity. 9. Comments on national legislation and the opinions of federal judges. 10. Summary of results, and prospects for the future. |
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§ 233 b. This power, if it exists, must be derived from the provision in the United States Constitution, giving Congress power to "regulate commerce with foreign nations and among the several states." (a) It will be perceived, that the power to regulate

³ *Crandall v. Nevada*, 6 Wal. 35.

(a) Although this power of Congress is undoubted and paramount, it is perfectly settled that the mere existence in Congress of the power unexercised will not prevent legislation by the states. *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *Cooley v. Philadelphia Port Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Wal. 713; *Crandall v. Nevada*, 6 Wal. 35; *The Lottawanna*, 21 Wal. 558; *Pound v. Turk*, 95 U. S. 459. Where the subjects are in their nature national or admit of a uniform system, the power of Congress is said to be exclusive. *Reading Railroad Co. v. Pennsylvania*, 15 Wal. 232; *Erie Railway Co. v. Pennsylvania*, 15 Wal. 282; *Mobile County v. Kimball*, 102 U. S. 691; *Kaiser v. Illinois Central Railroad Co.*, 16 Am. & Eng. Railw. Cas. 40. But nevertheless when Congress has not acted, and the matters are either local in nature or operation or intended as mere aids to commerce for which special regulations can more effectually provide, the states may act. *Mobile County v. Kimball*, *supra*. Thus, a state may in such case establish maximum rates of charges for

commerce with foreign nations and among the several states must be precisely the same, because it is given in the same clause of the constitution and in precisely the same words. (b)

1. The natural import and construction of the terms of the constitution would not seem to admit of much doubt, judging from the language merely. The meaning of the word "commerce" at the time the constitution was adopted must have been definitely settled, and well enough understood. The word, as well understood, is derived from the Latin *commercium*, which is found, almost in its original form, in most of the languages of modern Europe. It means, in its most literal sense, intercourse and exchange, both of persons and commodities. It is more nearly synonymous with traffic than with any other word in the language, probably. Its great natural divisions for ages have been foreign and inland. The regulation of all the former, and that portion of the latter which extended beyond the limits of a single state, was, as we have seen, by the organic law of our national government, secured to the nation, and the remainder was naturally left to the particular state where it exclusively existed.

2. It is obvious that the purpose of the provision was not to be confined to future commerce carried on in the same mode it then

freight or passengers on roads in the state, though the roads are also engaged in interstate commerce, their business being carried on in the state and being matter of domestic concern. *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*, 94 U. S. 155; *Piek v. Chicago & Northwestern Railway Co.*, 94 U. S. 164. But not to regulate carriage from one state into another. The absence of congressional action must be deemed to show an intention to leave such carriage free. *Hardy v. Atchison, Topeka, & Santa Fe Railroad Co.*, 18 Am. & Eng. Railw. Cas. 432. And see *Wells v. Northern Pacific Railroad Co.*, *Ib.* 440. *Wabash, St. Louis, & Pacific Railroad Co. v. Illinois*, 26 Am. & Eng. Railw. Cas. 1; *Railroad Commissioners v. Railroad Co.*, 22 S. C. 220. But see *Providence Coal Co. v. Providence &*

Worcester Railroad Co., 26 Am. & Eng. Railw. Cas. 42. The right of the state reasonably to limit charges on roads in the state is not to be granted away except by words of positive grant or words in law equivalent. *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307. A company is as to domestic traffic a corporation of a state and subject to state laws, where the road is a part of a continuous line in two or more states owned and managed by corporations each the creature of a separate state. *Ib.* And see *Nashua & Lowell Railroad Co. v. Boston & Lowell Railroad Co.*, 16 Am. & Eng. Railw. Cas. 488, and *Pittsburg & State Line Railroad Co. v. Rothschild*, 26 Am. & Eng. Railw. Cas. 50.

(b) See *Brown v. Houston*, 114 U. S. 622, which goes to this point.

was ; i. e., by ship and boat navigation propelled exclusively by wind. If that had been so, the provision could not have been applied to that large portion of commerce now carried on by steam power, which has already become very considerable, and is constantly increasing in a rapidly advancing ratio. In the very infancy of steam navigation the question arose in the well-known case of *Gibbons v. Ogden*,¹ how far this provision of the United States Constitution extended. The opinion in this case contains a most invaluable commentary upon that question, inasmuch as it was so near the date of that instrument as presumptively to embrace the result of all the contemporary aids to the construction, some of which are specifically referred to in the argument ; and also because it fixes the scope and operation of the provision by the court having exclusive final jurisdiction of the question ; and, finally, because it has been always followed, in later cases.

8. It seems to have been made a question, in *Gibbons v. Ogden*,¹ how far the power of Congress extended to the regulation of the means by which foreign and interstate commerce was carried on. It was argued that the power extended only to the regulation of trade, or the mere buying and selling, or exchange, of commodities. But the court treated this as a studiously narrow construction of the provision, and nearly synonymous with its denial or extinction. The court held the national constitution to be an instrument of "enumeration" of powers, and not of "definition." Mr. Chief Justice MARSHALL said : "Commerce undoubtedly is traffic, but it is something more ; it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches ; and is regulated by prescribing rules for carrying on that intercourse." The learned judge very justly argues, that "all America" had understood, from the first, that commerce "comprehended navigation ;" and that the control and regulation of it, in this extended sense, had been one of the leading motives for adopting the present frame of government.² It

¹ 9 Wheat. 1.

² This is clearly enough shown by the prior history of the government. The very basis of the first attempt at organized national action was the regulation of trade and intercourse between the colonies and the mother country. At the time of the adoption of the Articles of Confederation the regulation of commerce was left to the separate states. It was, no doubt, in a great measure, the intolerable nature of the results of thus referring all commercial

seems never to have entered the minds of the delegates of the Convention, that the regulation of commerce among the states or with foreign nations could be conducted by the states. The experience already had in that attempt had shown its utter futility. The most that any objector asked in the Convention was that it be left to Congress, but that a two-thirds, or larger majority, be required to establish binding regulations.³ The former experience of the attempts of the states to regulate commerce, outside of the particular state, seems to have convinced all, by the most convincing of all arguments, the *reductio ad absurdum*, that the thing was simply impossible. And it seems never to have entered the mind of any one that the power of regulating foreign or interstate commerce was susceptible of division between the nation and the states. It was, therefore, made entirely satisfactory to the court, in *Gibbons v. Ogden*,¹ that the "regulation of commerce" committed to Congress embraced the entire thing with all its means, instruments, and appliances. Thus Mr. Chief Justice MARSHALL says: "Commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit" as to the interstate commerce. This term the learned judge further defines as embracing all commerce carried on within the limits of the United States which extended to more than one state, and which did not begin and end in the same state, so as to "be the exclusive internal commerce of a state." Mr. Justice JOHNSON, in delivering a concurring opinion to that of the Chief Justice, uses language still more explicit, if possible. The learned judge said: "Commerce, in its simplest signification,

regulations to the states, which urged the people to adopt the constitution. Mr. Justice JOHNSON so states in *Gibbons v. Ogden*, 9 Wheat. 222. And it is noticeable, that in all the projects for a constitution, and in all the drafts and reports brought before the Convention, this provision as it now stands is found in precisely the same form, even to the words, with the single exception of the portion affecting trade with the Indians, which is found only in the final draft. 1 Elliot's Debates, 221-230; 2 Madison Papers, 1226, 3 id. 1549. It is thus very obvious that the Convention, and presumptively the country, was convinced that the regulation of commerce, whether foreign or interstate, must be left to Congress.

³ 3 Madison Papers, 1450, where Mr. Pinkney moved to require a two-thirds vote.

means an exchange of goods ; but, in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce ; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Ship-building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects would not possess power to regulate commerce." The learned judge argues, with great clearness, that all these were intended and understood to be embraced within the range of the provision for the regulation of commerce by Congress. And the Chief Justice, in the principal opinion, said : " The real and sole question seems to be, whether a steam machine in actual use deprives the vessel of the privileges conferred by a license. In considering this question, the first idea which presents itself is, that the laws of Congress for the regulation of commerce do not look to the principles by which vessels are moved." It is here also decided that commerce embraces the transportation of passengers as well as goods and other commodities, and that the means by which it is done " is left entirely to individual discretion."

4. It is thus made very apparent, from a careful examination of the argument in *Gibbons v. Ogden*,¹ by which transportation of goods and passengers by steamboats and steam vessels of every kind, is brought under the provisions originally framed for the regulation of that which was carried on by sailing vessels, that if the question had then presented itself to the mind of the court, how far railway traffic should be brought under the same power of regulating commerce which had already been extended to the traffic by navigation, there can really be no fair doubt how it would have been determined. The fact that the entire subject of regulating all commerce among the different states, including all the means and appliances by which it was carried on, was committed to Congress, and that, thereafter, the states were to have no concurrent action in the regulation of the same, would seem to reduce the question of Congress having the power of regulating interstate railway traffic to the single inquiry, whether it forms any portion of the commerce of the country, which requires to be regulated at all. Those who assume to argue that Congress has no power to regulate the traffic upon

these extended lines of railway reaching from one end of the Union to the other, must, if they would meet the question fairly, either say, the traffic on these extended lines of railway, amounting to many millions annually, probably ten times as much as the entire commerce of the country at the time of the adoption of the constitution, is not commerce at all, or, if it be, is not subject to any regulation or control whatever. For it is certain the states have neither the power nor capacity to regulate, to any purpose, or with any efficiency, this interstate railway traffic. It must then come under the control of Congress or be left to its own devices and impulses, — an experiment never yet tried in any other country.

5. It may not be amiss to refer to some of the later decisions of the national courts upon the construction and extent of the power of Congress to regulate commerce among the states. In one case,⁴ before Mr. Justice STORY, it was declared: The power to regulate commerce includes the power to regulate navigation with foreign nations, and among the states; it is an exclusive power which may be exercised with or without positive regulations. There are numerous cases where it has been held that Congress has the exclusive final power to determine what amounts to an obstruction to navigation.⁵ The power to regulate commerce comprehends the control, for that purpose and to the extent necessary, of all the navigable waters of the United States, which are accessible from a state other than that in which they lie; and includes necessarily the power to prevent any obstruction to their navigation.⁶ The phrase "navigable waters" is not now, as formerly, restricted to those waters where the tide ebbs and flows; but extends to all waters, on lakes or rivers, which are in fact navigable for boats of ten tons burden and upwards, and which communicate, by navigation, with the sea, or with two or more states. This is now the limit of the admiralty jurisdiction of the national courts.⁷ (c) In all this wide

⁴ *The Chusan*, 2 Story, 455.

⁵ *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421; *Silliman v. Hudson River Bridge Co.*, 1 Black, 582; s. c. 4 Blatch. 74, 395; *The Passaic Bridges*, 3 Wal. 782; *United States v. Railroad Bridge Co.*, 6 McLean, 517.

⁶ *Gilman v. Philadelphia*, 3 Wal. 713.

⁷ *The Genesee Chief v. Fitzhugh*, 12 How., 443.

(c) It extends also to an artificial though it lies wholly within and is navigable waterway like a canal, owned and controlled by a single state,

range, all commerce and all the means and instruments of commerce, are under the exclusive regulation and control of the laws of Congress.⁸ It is applied even to steamboats employed as lighters.⁹

6. It will not be important here to enumerate the exceptions to the regulation of commerce by Congress. It does not, of course, extend to that commerce which is exclusively within the limits of a single state; which begins and ends within the same state.¹⁰ Hence, a state law, conferring an exclusive right to the navigation of the upper waters of a river wholly within the limits of such state, and separated from tide water by falls, which are impassable for purposes of navigation, and not forming a continuous line of commerce between two or more states, or with a foreign country, is not unconstitutional.¹¹ And it seems to have been considered, by the later decisions, that so long as Congress wholly abstains from all attempts to regulate any particular department of commerce, either foreign or interstate, state laws in regard to the same will not be declared void.¹² There are some subjects of state cognizance, which in their operation and enforcement produce an effect, incidentally, upon commerce beyond the limits of a single state, such as pilotage, ferries, health regulations, the support of paupers, police, and crime, which, nevertheless, must be left to the control of the states, and whose legislation, if fairly kept within necessary limits, must be upheld.

7. We have thus seen how extensive and how exclusive is the national control over every species of commerce extending beyond the limits of a single state, and how entirely all its instruments are brought under the national control, in every existing

⁸ *Jolly v. Terre Haute Draw-Bridge Co.*, 6 McLean, 287.

⁹ *Foster v. Davenport*, 22 How. 244.

¹⁰ *The Passaic Bridges*, 8 Wal. 782; *Halderman v. Beckwith*, 4 McLean, 286.

¹¹ *Veazie v. Moor*, 14 How. 568.

¹² *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Woodman v. Kilbourne Manufacturing Co.*, 6 Am. Law Reg. n. s. 238; *Cooley v. Philadelphia Port Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 8 Wal. 718.

if it is a highway for commerce between ports and places in different states; and it makes no difference in case of a libel for collision that one or the other of the vessels was on a voyage between ports in the state. *Ex parte Boyer*, 109 U. S. 629.

mode of its being carried forward, as far as those questions have arisen in the courts. We have also seen how readily new modes of carrying on commerce have hitherto been brought under national regulation. If we refer to the numerous acts of Congress for the security of property and life connected with commerce, and for its encouragement and protection in all its relations and departments, and reflect how almost exclusively the entire subject is brought under the supervision and control of Congress, we shall find slight ground to question that such supervision will be extended to the interstate commerce upon railways, and that it may rightfully be so extended, since there seems to be no other mode of rendering this interstate railway traffic safe and just to passengers and the owners of freight, and at the same time reasonably remunerative to the companies.

8. Whether, then, this question is viewed in the light of abstract reason and necessity, as forming one of the most important channels of commerce, both national and foreign, or in that of authority, from the analogy of the decisions affecting commerce carried on by means of navigation, we can entertain no reasonable doubt or question that the national or interstate commerce upon our railways must be placed and kept under the regulation and control of Congress. It would be very wonderful, after our railways had, by voluntary connections, extended their lines in almost every direction throughout our entire territory, and even across the continent, and thus made themselves the carriers of the world, and engrossed almost the entire commerce of the nation, so far as it is carried on among the several states, and a large share of the carrying business of other nations, in seeking shorter and safer routes by land than can be found upon the ocean; if, after all this, we are soberly to be told that there is positively no earthly power adequate to regulate and control this vast monopoly of transportation, it will afford an illustration of the defectiveness of our governmental organization and arrangements, which we have not hitherto felt ourselves very ready to admit.

9. Railway transportation has grown up so recently, and is still in so undeveloped and unsettled a state, that public attention has not been very generally or extensively called to the question of national control. There are, too, some special reasons why the public attention has not been attracted in this direction. The railways have mostly been chartered by the several states, with

primary reference to the internal business of such states. The extension of lines, and even the practical consolidation of the different interests, have been reached by traffic arrangements among the different companies. This might more properly have been done through the legislation of Congress, in the regulation of interstate commerce. But it seems not to have occurred even to the companies themselves, until a late day, that they required any sanction of the laws of Congress for forming these extended lines of interstate commerce and intercourse. The first act of Congress upon the subject was in 1866.¹³ This statute is very brief, and seems to be nothing more than an enabling act, evidently passed at the instance of the railways. Since that time nothing in the way of legislation has been done. The subject has been before the Committee of Commerce, in the House of Representatives, and the chairman, at the late session, introduced a bill for the purpose of securing uniformity of charges upon railways throughout the country, which is, undoubtedly, a very great desideratum. But the influence of the numerous railway companies is so extended and so controlling, that we fear it may be a long time before any detailed enactment of Congress, securing all that is demanded to render railway traffic throughout the country safe and reasonably uniform in price, will be passed through all its stages, so as to become the recognized law of the land. (*d*) And when this is accomplished we are but one step advanced towards the final accomplishment of the great desiderata connected with

¹³ An act to facilitate commercial, postal, and military communication among the several states, approved June 15, 1866. 14 Sts. at Large, 66.

(*d*) The want of action by Congress regulating or assuming to regulate interstate carriage by rail has now been met by the interstate commerce act of February 4, 1887. That act applies to carriage between states and territories, and between states or territories and adjacent foreign countries. It forbids all "unjust and unreasonable" charges, all "undue or unreasonable preferences," and all discrimination between connecting lines. It also forbids freight pools and a less charge for a long haul than for an included short

one, unless authorized by the commission for which the act provides. The provisions of the act are too important and, it may be added, too susceptible of conflicting construction to be here further summarized. The exposition of their precise meaning must here, as elsewhere, await that slow solution by multiplied issues and judgments, which is the first period of all statutes, — but especially of those which attempt to deal with interests so extensive and so infinitely various, in a manner so sweeping.

railway traffic. The most difficult part of the work, the strict and impartial enforcement of the law, still remains. And in our country, probably in all free countries, it is much less difficult to secure good laws than to maintain their strict enforcement. And this is especially difficult with an elective judiciary for short terms, as is now the case in most of the states. Judges, upon delicate or difficult questions, proverbially court delay; and this may more naturally occur when a few months may carry them beyond the necessity of acting at all. And popular elections do not commonly bring the most iron-willed men into prominence. Good-natured, easy-minded men, are, as a rule, largely more popular. But we have great hopes that, when these questions are matured for the action of the national judiciary, we shall see a far different result,—one that will tell upon the business and character of the country. Two of the most eminent of the federal judiciary have already borne most unequivocal testimony in favor of the view for which we contend: Mr. Justice MILLER, of the Supreme Court, in his opinion in the Circuit Court, in *Gray v. The Clinton Bridge*,¹⁴ and Mr. Justice DILLON, of the Circuit court, in an extended note to the report of the case just cited. Mr. Justice MILLER here says: “For myself, I must say that I have no doubt of the right of Congress to promote all needful and proper regulations for the conduct of the immense traffic over any railroad which has voluntarily become part of one of those lines of interstate communication, or to authorize the creation of such roads when the purposes of interstate transportation of persons or property justify or require it.” This expression of opinion by Mr. Justice MILLER Mr. Justice DILLON quotes, and warmly approves, in his note to this case.

10. It will add very little to the weight of the authority already quoted, to say, that our own studies upon the important question we have here so imperfectly discussed, continued as they have now been for nearly the period of a generation, and since the earliest stages of railway development in the country, have irresistibly led to the same opinion, so well expressed by Mr. Justice MILLER. It would be strange if that opinion should not ultimately prevail, both in Congress and in the courts. When we reflect how large an amount of the commerce, at one time carried on upon the great rivers of the country, has already been transferred to the

¹⁴ 7 Am. Law Reg. n. s. 149.

railways, and that the small remnant still remaining upon the rivers and canals is fast going the same way, it requires no spirit of prophecy to foresee that any construction exempting the traffic upon railways from the commercial clause in the United States Constitution, must, in a large measure, render it practically nugatory, and thus largely tend to defeat the very purpose of that provision by throwing us back into the uncertainty and confusion existing under the Articles of the Confederation, which no patriot can contemplate but with sorrow and dread, and which we cannot believe is ever to be visited upon us again, through so shallow a device as this attempt to escape the proper national control of the traffic upon interstate railways.

PART XIII.

**THE LAW OF RAILWAY INVESTMENTS, DIVIDENDS,
AND CREDITORS.**

PART XIII.

THE LAW OF RAILWAY INVESTMENTS, DIVIDENDS, AND CREDITORS.

* CHAPTER XXXIIL

RAILWAY INVESTMENTS.

SECTION I.

Acts of Company affecting the Value of Stock and Bonds. Over-issue of Stock.

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| 1. Importance of the law of railway investments. | 9. Original inclination of courts to put such shares on level with genuine ones. |
| 2. English statute requires stock subscriptions to precede the grant. | 10. 11. More recent opinion otherwise, at least as to stock issued beyond charter limit. |
| 3. Duty of railway directors in regard to speculations in shares. | 12. Right of canal company to mortgage tolls without consent of legislature. |
| 4. Nature and effect of some expedients to raise funds to build railways. Issuing stocks, bonds, &c., at different prices. | 13. New company, formed after sale on mortgage, succeeds to rights of old company. |
| 5. Should be restrained by statute. Difficulty no excuse. | 14. Parol gift of railway debentures, where act of Parliament requires deed duly stamped. |
| 6. Something might be effected by legislation. | 15. Such gift lately maintained in England. |
| 7. Losses through such investments fall severely on small owners. | |
| 8. Over-issue of stock of a somewhat similar character. | |

§ 234. 1. THERE is perhaps no subject connected with the law of railways which comes home so directly to the pecuniary interests of so large a number of persons in this country as that of railway investments in the various forms of stock, original and preferred, and bonds and mortgages. But it will not be in our power to give much information upon the subject, and none prob-

ably which will afford relief to those who have adventured their money in these enterprises which so generally, in this country, have proved unproductive. But few questions in regard to the subject have yet (1857) been definitely settled in this country, and these, for the most part, are of secondary importance, in comparison of those which yet remain unsettled.¹

2. This subject is incidentally alluded to in former portions of * the work.¹ In England the provisional committees of the promoters of railways issue scrip certificates, which are publicly sold at the stock-exchange,² and pass from hand to hand, by delivery,³ without the necessity of formal transfers or stamps.³ The holders of these scrip certificates ordinarily have their names entered upon the registry of shareholders, after the act of incorporation is obtained, and thus constitute the members of the corporation, and are liable for calls.⁴

3. We have seen, too, that all speculating practices by the directors of a railway, or other business corporation, with a view to raise the market value of shares, are fraudulent, and will be relieved against in equity, and the participators punished criminally.⁵

4. There have been some expedients resorted to for the purpose of enabling companies to complete their works, without the requisite capital *bona fide* subscribed and paid in, which, as they do not seem to have come much under discussion in the judicial tribunals of the country, we can do little more than allude to, but which have so serious a bearing upon the safety and permanent value of railway investments, that we cannot, perhaps, with perfect propriety, altogether pass over them.

Where the charter of a railway company does not limit the amount of capital, except by the necessity of the undertaking, as the work progresses the stock naturally becomes more or less depreciated in the market, and it has sometimes been the practice of the directors, either with or without a vote of the shareholders,

¹ *Supra*, §§ 17, 41, 55, 56, 59.

² *London Grand Junction Railway Co. v. Freeman*, 2 Man. & G. 606, 638; *Jackson v. Cocker*, 4 Beav. 59; s. c. 2 Railw. Cas. 368, 372; *Heseltine v. Siggers*, 1 Exch. 856.

³ *Wiley v. Parratt*, 6 Railw. Cas. 32; s. c. 3 Exch. 211; *Vollans v. Fletcher*, 1 Exch. 20; *Moore v. Garwood*, 4 Exch. 681.

⁴ *Supra*, §§ 2, 29, 58.

⁵ *Supra*, §§ 41, 59; *infra*, 241.

to issue shares at a reduced price, so much below the market price as to induce sales. And sometimes such an expedient has been repeated, according to the necessities of the case and the desperate fortunes of the enterprise. Such practices cannot fail to strike all minds alike as desperate financial expedients,⁶ and * more or less fraudulent in their operation upon the market value of stock sold at a higher price. But we see no reason to doubt * their binding obligation upon those who approve them by their votes, and it would seem that the minority who vote against them * should take measures to stop them before the stock goes into the market and falls into the hands of *bona fide* purchasers, or they will be precluded from objecting afterwards.⁶ Questions of this kind will doubtless come before the courts, and we do not intend to express any very settled opinion upon them here.

A very similar series of expedients is perhaps more commonly practised by way of bonds and mortgages and preferred stock, which latter indeed amounts to much the same thing as a mortgage under a different name.^(a) In this country these mortgages have usually been so framed as to create successive liens, in the order of their being issued, as first, second, and third mortgage bonds. These are issued in large general sums, subdivided to suit the wants of purchasers in the market, and when sold at par and above, are perhaps the most unobjectionable mode of completing an enterprise that otherwise must stop *in medio*. But when sold, as they * commonly are, at reduced prices, in

* *Herrick v. Vermont Central Railroad Co.*, 27 Vt. 673, 692; s. c. 1 Redf. Am. Railw. Cas. 805. The courts have felt compelled to recognize such contracts as valid and binding unless resisted in a formal and judicial mode. *Faulkner v. Hebard*, 26 Vt. 452; s. c. 2 Redf. Am. Railw. Cas. 692.

In *Sturges v. Stetson*, 10 Am. Railw. T. No. 50, Mr. Justice McLEAN presiding, it was decided, LEAVITT, J., giving the opinion, that where the plaintiff entered into a scheme with a railway company, through the directors, to enable them to sell him shares below the par value, it was, as to the directors, *ultra vires*, and as to the other shareholders, fraudulent, and entitled them, by proper proceeding, to compel the reduction of the number of plaintiff's shares, so as to bring them to the par value. At the same time, in *Fosdick v. Sturges*, which was an action to compel defendant to refund money received for stock sold under similar circumstances, it was held the action will lie.

(a) Thus an agreement that preferred stock shall be a lien of a certain order will create a valid lien enforceable against subsequent incumbrancers with notice. *Skiddy v. Atlanta, Mississippi, & Ohio Railroad Co.*, 3 Hughes, 320.

proportion to the waning fortunes of the company, they must of course destroy at once the credit of the stock and operate harshly upon its holders.

This is not the place, nor are we disposed, to read a homily upon the wisdom of legislative grants, or the moralities of moneyed speculations in stocks on the exchange or elsewhere. But it would seem that legislation upon this subject should be conducted with such deliberation and firmness as not to invest such incorporations with powers so unlimited as to operate as a net to catch the unwary, or as a gulf in which to bury out of sight the most disastrous results to private fortunes, — results which have justly rendered American investments, taken as a whole, a reproach wherever the name has travelled. Experience will perhaps show that desperate enterprises require desperate means for their accomplishment, and will always find men for their management whose characters will conform more or less to the necessities of their position. And if by legislative restrictions they are precluded from the more obvious devices and expedients for the relief of their straitened fortunes, they will only be forced to the adoption of such as are more complex, less superficial, and consequently the more likely to seduce inexperienced capitalists into their investments.

5. But even this is no apology for such unrestricted powers as are often given to these companies. And the mode in which such things are here carried through the legislature, by means of agents who have, where there are no rival interests, very much their own way, without even the necessity of subjecting their plans to any permanent board of supervision who shall have such matters under control, and devote such time to their study as not to be misled by the devices of the interested, — this mode of accomplishing such things sufficiently explains why, in this country, no restrictions are placed upon such companies.

6. If some reliable estimate of the cost of such undertakings were obtained, by means of a board of trade or railway commissioners, and no work allowed to go forward until a large proportion or the whole of the requisite capital were obtained by stock subscriptions, it would afford great security.⁷ And if all mort-

⁷ Both these requisites are contained in the English Railway Acts, and the standing orders of parliament. Hodges Railw. 16-44; Companies' Clauses Consolidation Act, 8 & 9 Vict. c. 16, §§ 42, 44; Hodges Railw. 73, 74.

gages, * at whatever time given, were placed upon the same footing, as to priority,⁷ it would give far less temptation to speculation in mere bubble investments, which are too frequently offered in this country. But there is perhaps no remedy for this incautious legislation in this country but the severe and hard discipline of that most painful but surest teacher, experience. It is, we think, rather creditable to the promoters of railways in this country, that with such unlimited powers as their charters confer they have been so little abused, and this, in the main, not often by design or for private ends, but through inexperience and want of skill.

7. We have deemed it not improper to allude to this subject, in this connection, chiefly because of the far greater severity and extent to which such losses are felt throughout society in this country than in older states. Here (1857) we have no national funded stock in convenient sums for small investment, and which being sure is really a great blessing to the mass of those who wish to invest moderate sums, as a protection against age or calamity. In those countries where such opportunities exist, it removes all temptation to invest small sums in these enterprises, which, however necessary for the public, such small owners can but poorly afford to aid in carrying forward, and which consequently should in justice either be guaranteed or owned by the state, or at all events aided by state credit, when they become indispensable for the public convenience, but are so extensive or so little remunerative at first as to be an unsafe undertaking for private enterprise.⁸

8. There is a class of questions, somewhat analogous to some of the foregoing, which has arisen extensively in this country in regard to a few companies, which is denominated the over-issue of stock. By this is understood an express fraud by managing directors, or agents, in issuing stock without any authority, and in

* There are very serious objections against state management of public works, of course. They are not likely to be as productive or as efficient under such control, and are liable, in popular governments, to serious abuse. But there should be some mode of equalizing public burdens for such works, and in practice none perhaps has operated better than the loaning of state credit, which creates a reliable stock for capitalists, small or great, and affords some security that the management will be as good as public servants can be found ready to secure, and that legislation will be more carefully watched than where the public have no interest.

* many instances mere fictitious stock, after all the shares created by the charter had been issued and sold. There was a strong disposition manifested at first, among the legal profession and business men, to hold such fictitious shares entitled to the same claim upon the funds of the company as the genuine shares, and that the only effect of the over-issue would be to diminish, in the same proportion, the amount and value of the genuine shares.

9. This opinion was based upon the view, that the company, having intrusted their agents with the means of putting such spurious stock in circulation, should be bound by their acts. This was a plausible view certainly, and the courts before which the questions first came very generally adopted it.⁹

⁹ *Mechanics' Bank v. New York & New Haven Railroad Co.*, 4 Duer, 480. The case in this court was put mainly on the ground of the authority of the transfer agent of the company, he having certified to the genuineness of the stock, and that this being an act within the acknowledged scope of his employment, would bind the company. And even if the company had not power to issue stock beyond the amount limited in its charter, in regard to which the court were not agreed, still the promise to issue it will bind them, and render them liable in damages, which will produce the same result as if the shares were to be held genuine.

In *New York & New Haven Railroad Co. v. Schuyler*, 38 Barb. 534, it is held, that where the capital stock of a corporation is limited by its charter to a certain number of shares, it is not in the power of the directors, by any resolution or act, to increase the number beyond that amount, or directly or indirectly to delegate authority to make such increase; that no act of negligence or misconduct of the agent can effect indirectly what the corporation cannot do directly; and that the doctrine of estoppel cannot be applied to give validity to what would be an illegal act, or to prevent the company from setting up, in answer to a claim to stock, that the same is void, as having been issued in excess of the capital. But the court also lays down the rule that a corporation is liable for the acts of its transfer agent in issuing false certificates of stock, and allowing false transfers, and for negligence on the part of the corporation and its officers in permitting transfers of spurious stock to be made on the books of the company to persons desirous of becoming stockholders; and that a corporation is liable to respond in damages for any loss sustained either by the fraud or negligence of its agents in discharging the particular duty assigned to them; as where a company is bound to keep transfer books for the purpose of transferring stock, and on being applied to by persons about to purchase stock, to know whether shares have been transferred to them, the officers and clerks give the information that shares have been so transferred, and also give the certificate thereof, on the faith of which statements money is paid, when in fact no such transfers had been made, and the party making the transfer had no stock to his credit to dispose of. And see *Shotwell v. Mali*, 38 Barb.

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* 10. But subsequent investigation of the subject before the courts of final resort led to a different conclusion, especially in regard to cases of stock issued beyond the limit of the charter, and where consequently there was a defect of power in the corporation itself to issue the stock, and also where the stock was originally transferred to one aware of the mode in which it was created, although subsequently coming into the hands of a *bona fide* purchaser. It was held that where the act, if done by the corporation, would have been *ultra vires*, the transaction, when done by the directors, could have no force, and even when the corporation had power, and the manner of employing the agent enabled him to bind the company in a contract with one ignorant of his bad faith, yet if the person contracted with was aware of the bad faith of the agent, he not only acquired no title to the stock, but a *bona fide* purchaser from him would stand in no better situation.¹⁰ (b)

445, where it was held that the officers of a corporation authorized to issue certificates of stock to shareholders as evidence of title are liable not only to the immediate purchaser from them of spurious stock, falsely and fraudulently certified by them, but to any subsequent purchaser buying on the faith of the false certificate, and sustaining damage thereby; that although the purchaser of spurious stock has a remedy by action against his vendor, for a breach of the implied warranty of title, it does not constitute a bar to an action against one who has induced the purchase by a fraudulent representation that the vendor had title to the stock, whereby damage has resulted; that the purchaser's right of action against the officers of a corporation concerned in the issue of spurious stock is complete from the purchase, and will not be affected by any subsequent action of the directors in turning out other property to him to an amount exceeding the cost of the false certificates; and that any one furnishing to another a false and fraudulent document, purporting to show title in the latter to any property, is liable to any one sustaining damage therein. And see *Cazeaux v. Mali*, 25 Barb. 578.

¹⁰ *Mechanics' Bank v. New York & New Haven Railroad Co.*, 13 N. Y. 599.

In *McNeil v. Tenth National Bank*, 46 N. Y. 325, where the owner of shares in the capital stock of a corporation pledged them to a broker for an advance of money and deposited the certificate of the shares with the brokers, indorsed in blank and with a blank power of attorney to transfer the same, and the broker wrongfully pledged them to secure an advance to himself, it

(b) More recent cases are not wanting, however, which hold the company liable to a *bona fide* purchaser or holder. See *Willis v. Philadelphia & Darby Railroad Co.*, 13 Phila. 33; *Tome v. Parkersburg Branch Railroad Co.*, 39 Md. 36.

* 11. And it is, we think, impossible to doubt that the final result arrived at is far more consonant with acknowledged prin-

was held, after careful examination of the cases in that state, that the pledge by the broker was good as against the owner, and that he could redeem the shares only on payment of the sum due the pledgee. But where the directors of a railway corporation issued certificates purporting to represent capital stock which had not been subscribed or paid for, and put them on the market below par, it was held that the act was *ultra vires* both of the directors and the stockholders, and that it could not be legalized even by an act of the legislature of one of the states granting the charter of the company. The court will enjoin the transfer of such false and fraudulent issue of pretended shares. *Fisk v. Chicago, Rock Island, & Pacific Railroad Co.*, 53 Barb. 513.

In *Lexington & Big Sandy Railroad Co. v. Goodman*, 9 Am. Railw. T. No. 52, it was held by the New York Supreme Court that a bill to enjoin the holders of railway bonds and other securities, which had been deposited with an agent of a railway company, with power to sell or pledge to raise money for the use of the company, and which it was alleged had been misapplied by such agent, and were in the hands of numerous parties, on different contracts, invalid as against the company, could not be maintained against the agent and the several persons into whose hands he had passed the securities, there being no privity among the several defendants. But on general principles of equity, it would seem that such a joinder amounts to multifariousness only when the securities in the hands of the different defendants are wholly distinct; in which case only the agent, and the particular person or persons obtaining each separate parcel of the securities, constituting one transfer, should be joined. But if the fund were one and inseparable, all participating in its transfer might be joined.

In a case before Vice-Chancellor STUART, it was decided, on great consideration, that where the directors of a joint-stock corporation issue debentures, in form of non-negotiable bonds, without complying with the requirements of the deed of settlement, in regard to borrowing money, and such securities come into the possession of *bona fide* holders for value, without notice of any infirmity affecting them, such holders cannot recover for them, as regards the great body of the shareholders. The Vice-Chancellor professed to base his judgment on the authority of *Ernest v. Nicholls*, 6 H. L. Cas. 401, and seems to have arrived at a conclusion similar to that stated in the text, that persons dealing in the market for the debentures of a company of this sort are bound to use reasonable precaution in seeing to the authenticity of the securities they are purchasing. But see *Greenwood's Case*, 23 Eng. L. & Eq. 422; s. c. 3 De G. M. & G. 471; *Athenæum Assurance Co. v. Pooley*, 1 Gif. 102; s. c. 31 Law T. 70. In a later English case, however, it was held, that where shares in a company have been issued fraudulently, a *bona fide* purchaser of such shares in the market, before any bill has been filed impeaching the transaction, is entitled on the winding up of the company, notwithstanding the fraud, and although he bought the shares at a very great discount, to prove on equal terms with the other shareholders of the company who have bought their

ciples * than the one first attempted to be maintained, and is attended with fewer embarrassments and refinements. And it is by no means certain that it is not equally in accordance with the soundest principles of equity and moral justice. For whatever may be said of the duty of corporations to employ only reliable directors and transfer agents, and of the justice of the company being bound by their acts, within the apparent scope of their employment, all of which are in general terms most undeniable propositions, still, something is due to common prudence and reasonable caution on the part of those who deal in stocks, to see at least what the charter and books of the corporation will at once disclose to any one who will examine.

And if, instead of making reasonable examination of matters obviously within his reach, one sits down blindly to adventure millions upon a spurious issue of stock in such sums and at such times as to induce most prudent men to hesitate about its genuineness, it is perhaps not unreasonable that he should be held bound by such facts as the slightest examination must have disclosed. This is the rule in regard to most commercial and business transactions, and we see no special hardship in its application here, within reasonable limits. In a recent English case,¹¹ debentures, under the common seal of a joint-stock company, were given to P. in July, 1854, in pursuance of an arrangement made between him and the chairman of the directors, which was a fraud upon the company. These debentures were afterwards bought by another in the market, in the ordinary course of business. The last transfer was registered in the books of the company, and interest * was paid to July, 1855, but the matter was not made known to the shareholders till December in that year, when an investigation of the affairs of the company took place, and further payment of interest was refused. It was held, that although the purchase was *bona fide*, and for value, yet being only that of a chose in action not assignable at law, it must be taken subject to all equities attaching to it, and that, under the above circumstances, neither the registration nor the payment of interest had the effect of a con-

shares at par; but this privilege does not extend to any person who bought the shares after the filing of the bill, unless his vendor was a *bona fide* holder of the shares before the bill was filed; and the onus of showing that such was the case is on him. *Barnard v. Bagshaw*, 1 Hemm. & M. 69.

¹¹ *Athenæum Life Insurance Co. v. Pooley*, 3 De G. & J., 294; *infra*, § 241.

firmation of the title, and that the holder ought to be restrained from suing at law upon the debentures. This seems to be an entire confirmation of the views already stated.

12. In a recent case in Pennsylvania it is held, that a canal company cannot, without the consent of the legislature, mortgage either its tolls or such real estate as is necessary for the enjoyment of its corporate franchises.¹²

13. The purchasers under a mortgage sale of a railway and all its apparatus, in conformity with the powers contained in the mortgage, and who were afterwards incorporated by a new name, succeed to all the rights vested in the old company by a deed of land for the purposes of constructing their road.¹³

14. Some questions have arisen in the English courts as to the effect of a parol gift of railway debentures where the act of parliament requires the transfer to be by deed duly stamped. The decision of Vice-Chancellor SHADWELL, in 1846, would seem to indicate that the parol gift, with the delivery to the donee of the paper evidences of title, would have no legal effect, and that the executor of the donor was entitled to have the muniments of title restored to him, since the title of the debt had not passed.¹⁴ But the late examination of the question in the Court of Exchequer¹⁵ would seem to indicate a different result.

15. In this last case, the testator, about a year and a half before his death, gave the defendant two debentures, or railway mortgages, with the coupons attached, saying, "Take them and keep them for yourself, but you must give me the coupons that I may have the interest during my life," which defendant did do, keeping the debentures and coupons not due at the decease of the donor. This was an action of trover brought for the recovery of * the debentures and coupons, in the name of the executor. A verdict passed for the plaintiff, and on a hearing before the full court, upon a rule for entering the verdict for defendant, the rule was made absolute. The views of the court do not seem to be very clear or determinate, in regard to the true ground upon which the case should rest. POLLOCK, C. B., says, "I should consider that if a person gives the parchment upon which the mortgage is

¹² Steiner's Appeal, 27 Penn. St. 313. See this subject further discussed, *infra*, § 235.

¹³ Pollard v. Maddox, 28 Ala. 321.

¹⁴ Searle v. Law, 15 Sim. 95.

¹⁵ Barton v. Gaines, 3 H. & N. 387.

written, we ought to give effect to his act as far as we can." The judges all concur to this extent. WATSON, B., in the course of the argument, suggests the true ground, we think. That "the debt passes in equity." No American court of equity would hesitate to give effect to the gift upon that ground; or if there is any ground of hesitation, it is one which has certainly never occurred to us.¹⁶

SECTION II.

Rights and Remedies of Bondholders and Mortgagees.

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| <ol style="list-style-type: none"> 1. Under English statutes tolls only mortgaged. Ejectment will not lie. 2. Otherwise as to ejectment if priority of lien is created. 3. English acts allow in railway mortgages no covenant to refund the money. 4. But where there is no restriction, bond creditors and mortgagees may maintain covenant against company. 5. Where resort is had to equity, all parties standing in same right necessary parties to bill. 6. After appointment of receiver counter claimants cannot contest his rights, except in or by permission of the court. 7. Priority of right determinable only on motion to discharge the order of appointment. 8. Charter creating a lien in favor of bill-holders, lien subordinate to that of contractors for construction. 9. Whether corporation may mortgage franchise without consent of legislature. 10. Power to buy and sell real estate, and to borrow money, implies the power to mortgage for its security. 11. Company receiving benefit of money | <ol style="list-style-type: none"> estopped to deny authority of its agent. 12. Mortgage of property or franchise does not transfer title to franchise. 13. What may be mortgaged. After-acquired property. Consent of legislature necessary. Leading case in New Hampshire. 14. Right to mortgage after-acquired property maintained in equity in Kentucky. 15. So in equity in New Jersey. 16. So in Circuit Court of the United States.
n. (f). Seems now the settled rule. 17. Neither sale nor foreclosure allowed in England. 18. Lien for construction under agreement of company with contractor, preferred to that of the mortgagee.
n. (g). Priorities between holders of bonds of same or different issues. 19. Mortgage to secure contractor for construction. Rights of assignee, &c. 20. Mortgagees of railway property cannot remove portions of it, but must foreclose on the whole. Specific performance may be decreed. 21. Refusal to subrogate to rights of mortgagee party paying mortgage, under misapprehension as to his relation to property. |
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§ 235. 1. The remedies under railway mortgages will depend very much, of course, upon the powers granted by the legislature, * and

¹⁶ *Supra*, § 85; *infra*, § 239.

the forms of the contracts by which the mortgages are created. By the English acts more commonly it is only the tolls, and accruing profits of the road, and future calls, which are allowed to be mortgaged.¹ Under these mortgages it was decided that the mortgagee could not maintain ejectment, even where the deed purported to convey the undertaking, with all the estate, right, title, and interest of the company in and to the same.² This decision goes mainly upon the ground of defect of authority under the act.³ Similar decisions were made at an early day in regard to mortgages of canal and turnpike property, by trustees under act of parliament.⁴

2. But where these mortgages create successive liens, it has been held that ejectment will lie, and even a second or subsequent mortgagee of turnpike and canal tolls, including toll-houses, may maintain ejectment, and after the satisfaction of his own debt, hold for the benefit of those entitled.⁵ So, too, when the mortgage is of an aliquot portion of the tolls and toll-houses, the trustees of the work, who receive sufficient tolls on the portion conveyed to meet the interest on the mortgage, are not liable to an action for money had and received; but only in equity, which would seem to be the *only remedy of the mortgagee, unless by taking possession of the works, and receiving the tolls.⁶

¹ Statute 8 & 9 Vict. c. 16; *infra*, § 235 a.

² *Myatt v. St. Helen's & Runcorn Gap Railway Co.*, 2 Q. B. 364; s. c. 2 Railw. Cas. 756. But in the later case of *Wickham v. New Brunswick & Canada Railway Co.*, Law Rep. 1 P. C. 64; s. c. 12 Jur. n. s. 34, before the Judicial Committee of the Privy Council, Lord CHELMSFORD said, of the preceding case, that it "did not determine that the conveyance of an undertaking by a railway company would in no case carry the land."

³ The acts under which these contracts were made provided that the directors, for the borrowing of not exceeding £30,000, might "charge the property of the said undertaking, and the rates, tolls, and other sums arising and to arise by virtue of this act."

⁴ *Fairtitle v. Gilbert*, 2 T. R. 169. But see *Banks v. Booth*, 2 B. & P. 219.

⁵ *Thompson v. Lediard*, 4 B. & Ad. 137; *Watton v. Penfold*, 3 Q. B. 757; *Levy v. Horne*, *ib.* And where a prior mortgagee, under a power of sale, disposes of the property, the purchaser takes the property relieved of all subsequent mortgages, and the only remedy remaining to such mortgagees is a resort to the surplus accumulated by the sale, if any, in the hands of the prior mortgagee. This point was decided in the House of Lords, in *Southeastern Railway Co. v. Jorten*, 6 H. L. Cas. 425; s. c. 31 Law T. 44, reversing the decisions of the Vice-Chancellor and of the Court of Chancery Appeal.

⁶ *Pardoe v. Price*, 11 M. & W. 427; s. c. 13 M. & W. 267; s. c. 16 M. & W. 451. But a trustee under a trust deed from a railway company has no

3. And under mortgages executed in conformity with the English acts, no action against the company lies upon the deed, to recover the money loaned or the interest, the acts of parliament only authorizing a mortgage of the tolls, &c., and not a personal covenant.⁷

4. But bond creditors may maintain covenant for the money loaned.⁸ And where there is no restriction in the act of parliament, and the company, having the usual powers of a corporation, are allowed to borrow money, and to secure the payment of the same by an instrument which, upon the face of it, imports a covenant for payment, an action of covenant for the repayment of the money will lie against the company.⁹

5. But where a mortgagee or bond creditor goes into equity for relief, it seems to be the settled rule of that court that all standing in the same relation with the plaintiff must be made parties to the bill, either as defendants or by bringing the bill on behalf of all such as may choose to come in and take part in the controversy, or avail themselves of the benefits of it.¹⁰ (a) In such case

title to the income by force of such trust deed, unless he actually takes possession of and operates the road. *Coe v. Beckwith*, 81 Barb. 339.

⁷ *Pontet v. Basingstoke Canal Co.*, 3 Bing. N. C. 433; *Furness v. Caterham Railway Co.*, 25 Beav. 614; s. c. 27 Beav. 358; *Long v. Mathieson*, 2 Gif. 71; *Chambers v. Manchester & Milford Railway Co.*, 5 B. & S. 588; s. c. 10 Jur. n. s. 700. A railway company, with definite borrowing powers, can borrow in no way other than the one authorized. *Chambers v. Manchester & Milford Railway Co.*, *supra*. But see *Lowndes v. Garnett & Mosely Co.*, 33 Law J. Ch. 418.

⁸ *Price v. Great Western Railway Co.*, 16 M. & W. 244. See *White v. Carmarthen & Cardigan Railway Co.*, 1 Hemm. & M. 786.

⁹ *Hart v. Eastern Union Railway Co.*, 7 Exch. 246; s. c. 8 Eng. L. & Eq. 544; s. c. in error, 8 Exch. 116; s. c. 14 Eng. L. & Eq. 535; *Bolckow v. Herne Bay Pier Co.*, 1 Ellis & B. 74; s. c. 16 Eng. L. & Eq. 159; *Perkins v. Pritchard*, 3 Railw. Cas. 95, s. c. *nom.* *Perkins v. Deptford Pier Co.*, 13 Sim. 277; *Hill v. Manchester & Salford Water-Works*, 2 B. & Ad. 544.

¹⁰ *Mellish v. Brooks*, 3 Beav. 22; *Hodges v. Croyden Canal Co.*, 3 Beav. 86. These bonds and debentures, which stipulate for interest till a given time,

(a) But bondholders are not necessary parties to a bill for foreclosure brought by their trustees. *Williamson v. New Jersey Southern Railroad Co.*, 25 N. J. Eq. 13. Nor are holders of bonds secured by a second mortgage necessary parties to a bill brought by holders of bonds secured by a prior mortgage, to compel their trustees to take possession of the mortgaged property. *National Fire Insurance Co. v. Salisbury*, 4 Am. & Eng. Railw. Cas. 480.

a receiver is * appointed, who is to pay out the money received from tolls, &c., under the order of the court of chancery, according to equitable priorities.¹¹

6. And after the appointment of a receiver by the court of chancery, and possession taken by him of the effects of the company, all other creditors, whether of the same, or a superior, or inferior

when payment of the principal shall be made, bear interest till payment, according to the English practice, where interest is not so universally allowed as in our courts. *Price v. Great Western Railway Co.*, 16 M. & W. 244; 4 Railw. Cas. 707. A mortgagee, who takes possession of the works, is liable to be called to an account by any other mortgagee standing in the same degree of priority. *Fripp v. Stratford Railway & Canal Co.*, 29 Law T. 107; s. c. *nom. Fripp v. Chard Railway Co.*, 11 Hare, 241; *Crewe v. Edleston*, 1 De G. & J. 93; s. c. 29 Law T. 241. And see *Baker v. Backus*, 32 Ill. 79.

¹¹ A proviso in a mortgage of the property and revenues of a railway company that all the rights of the bondholders or trustees should be subject to the possession, control, and management of the directors of the said company until default made, was held in *Dunham v. Isett*, 15 Iowa, 284, not to give the creditors of the company, under contracts made before default, but after the execution of the mortgage, a preference over the mortgage liens. A bond or mortgage for securing money borrowed by a railway company, executed according to the statute form, is entitled to priority over an *elegit* sued out against the company by a judgment creditor. *Long v. Mathieson*, 2 Gif. 71; *Furness v. Caterham Railway Co.*, 27 Beav. 358. Where it was shown that a railway company, in violation of its duty, was applying and intended to continue to apply its revenues, the only means of paying its mortgage debts, to the satisfaction of junior incumbrancers, it was held in Maryland that the court would interfere, by injunction and the appointment of a receiver, to the extent of its jurisdiction, at the complaint of the party aggrieved. *State v. Northern Central Railroad Co.*, 18 Md. 193.

A railway company having become insolvent and unable to pay its debts, certain of the bondholders and other creditors agreed that they would purchase the road, at any sale that might be made thereof, and would organize a new company; that the new company should execute a new mortgage on the road to the amount secured by the first mortgage of the existing company, to secure bonds of the new company, the bonds under the old mortgage to be exchanged for the new ones. The plaintiff, a bondholder, signed the agreement, and received notice to deliver up his bonds, but failed to do so until after the purchase of the road and the formation of the new company. The agreement had been that they should surrender their old bonds, with all the coupons thereon, and receive in payment therefor the new bonds. It was held that the plaintiff, not having complied with the terms of the contract, had no right to claim any benefits under it, or to insist on the delivery of the new bonds. *Carpenter v. Catlin*, 44 Barb. 75. The subject of the appointment of receivers is extensively discussed in *Baker v. Backus*, 33 Ill. 79; *supra*, § 224 b.

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degree, are precluded from contesting their rights with the creditors, on whose behalf the receiver acts, by attachment or levy upon the goods, such act being regarded as a contempt of the court of chancery, as long as their officer holds custody of the goods and * effects of the company by an order from them.¹² (b) And that court will not entertain the question of priority of right in reply to the attachment for contempt. But if any other creditors claim priority, and wish to assert such priority of right to the effects of the company in the hands of the receiver, they must apply to the court of chancery for leave to do so, before that court.

7. So, too, the court of chancery refuses to entertain the question of the propriety of the appointment of the receiver, upon any collateral inquiry, and will do so only upon the motion to discharge the order.¹³ And upon such motion the question of the priority of the execution creditor will be considered, and if maintained, he will, by order of the court of chancery, be allowed to levy notwithstanding the appointment of the receiver, unless his debt be paid into court.¹⁴

8. Where the charter of a railway company, with banking powers, made the road a pledge for the redemption of the bills or notes of the company, it was held that this created a paramount lien upon only so much of the road as was constructed by the

¹² In *Ohio & Mississippi Railroad Co. v. Fitch*, 20 Ind. 498, it was held that the mere appointment of a receiver, with the powers usually given to a receiver in chancery, does not relieve the company from liability to suit. The receiver operates the road subject to such liability. *Supra*, § 168, pl. 1, note 2.

¹³ *Russell v. East Anglian Railway Co.*, 6 Railw. Cas. 501; s. c. 3 Macn. & G. 125; *Fripp v. Chard Railway Co.*, 11 Hare, 241; s. c. 21 Eng. L. & Eq. 53.

¹⁴ *Russell v. East Anglian Railway Co.*, 3 Macn. & G. 125; s. c. 6 Railw. Cas. 501. The elaborate opinion of Lord Chancellor TRURO, in this case, is of great importance upon this subject of the conflicting rights of creditors having different priorities, which in this country will be likely to become one of vast consequence, as most of our railway mortgages are so executed as to create successive equities.

(b) *Secor v. Toledo, Peoria, & Warsaw Railroad Co.*, 7 Bissell, 513; *Gest v. New Orleans, St. Louis, & Chicago Railroad Co.*, 30 La. An. 28, and cases *passim*. And the title of the receiver attaches on his appointment, not on the subsequent giving of bond in compliance with the order of appointment. *Maynard v. Bond*, 67 Mo. 315.

company; and that the portion constructed by the contractors, under a mortgage to secure them for the work done, was first liable to the contractor's lien, before the bill-holders could interpose any claim.¹⁵

9. But it seems to have been considered, in some of the American states, that railway companies, upon general principles, possessed the power to mortgage their effects in such a mode as to transfer the beneficial use of the franchise, for the benefit of creditors, and that a special permission in the charter to mortgage for a particular purpose did not abridge the general power.¹⁶ (c)

¹⁵ Collins v. Central Bank, 1 Kelly, 435.

¹⁶ Allen v. Montgomery Railroad Co., 11 Ala. 437. The same point is reaffirmed in Mobile & Cedar Point Railroad Co. v. Talman, 15 Ala. 472. In this last case it is said, in regard to the contract of mortgage, that neither the fact that it pledges the real and personal estate of the company without specification, nor that the amount to be secured is not stated, nor that it is made to secure future advances, nor that no time for redemption is fixed, can, *per se*, render it invalid. See Joy v. Jackson & Michigan Plank-Road Co., 11 Mich. 155; Coe v. Columbus, Piqua, & Indiana Railroad Co., 10 Ohio St. 372; s. c. 2 Redf. Am. Railw. Cas. 658; Coe v. Knox County Bank, 10 Ohio St. 412; Coe v. Peacock, 14 Ohio St. 187; Bardstown & Louisville Railroad Co. v. Metcalfe, 4 Met. Ky. 199; Pennock v. Coe, 23 How. 117; s. c. 2 Redf. Am. Railw. Cas. 667. Limited companies formed under the English statutes, without special articles of association, may, by special resolution of the shareholders passed with due formality authorize the directors to borrow on the debentures of the company. Bryon v. Metropolitan Saloon Omnibus Co., 3 De G. & J. 123; s. c. 4 Jur. n. s. 1262. And directors of a shipping company with limited powers, having power, by the company's articles of association, to do all acts which the company might, except such as were specially required to be done by the company in general meeting, may borrow money for the purposes of the company on the security of its ships. Australian Auxiliary Steam Clipper Co. v. Mounsay, 4 Kay & J. 733. See also Scott v. Colburn, 26 Beav. 276. *In re Magdalena Steam Navigation Co.*, 1 Johns. Ch. Eng. 690.

(c) But *contra*, Pullan v. Cincinnati & Chicago Railroad Co., 4 Bissell, 85, which holds that no corporation has power to mortgage its franchise without clear legislative authority, and that authority to a railroad company to mortgage its "road, income, and other property," will not suffice. And *contra*, also Meyer v. Johnston, 53 Ala. 237, which holds that in Alabama, in the

absence of special legislative permission, a railroad corporation by its mortgage conveys of its privileges or franchises such only as will enable the mortgagee to have the beneficial use of the property, not its franchise to exist as a corporation. This would seem to be sound enough, and conformable alike to practical reason and to technical rule; and like many other

A * power to purchase lands, necessary and convenient for prosecuting their works, and to dispose of the same, implies a power to mortgage them to secure the debts of the company.¹⁷ But the mortgage * must be executed in conformity with the by-laws of

¹⁷ *Gordon v. Preston*, 1 Watts, 385. And a corporation, created to construct a railway, has the power to borrow money, as one of the implied means necessary and proper to carry into effect its specific powers. And this was held to be so, although the charter directs that the funds shall be raised by subscription. *Union Bank v. Jacobs*, 6 Humph. 515. And the legislature having given a railway company power to mortgage or pledge its property for the payment of loans, it was held that a deed executed under this power, assigning the company's road and all its effects, conveyed all the powers and franchises of the original corporation. *Allen v. Montgomery Railroad Co.*, 11 Ala. 437; *Pollard v. Maddox*, 28 Ala. 321. In the former of these cases the court, in giving the opinion, said: "In our judgment, the general powers of the corporation extended to the creation of a lien on all its property, without reference to the mode of creating the debt," and in the latter case the same is affirmed.

The power of a railway corporation to borrow money and mortgage its property, is not limited by the usual clause in its charter that shares shall not be assessed over a certain sum, and if more money is necessary it shall be raised by creating new shares. An act of the legislature authorizing the trustees under a railway mortgage to sell the road, is a ratification of the mortgage so far as the state or public is concerned. A mortgage of a railway to secure bonds to be issued to raise money to pay the debts of the corporation, is not invalid as given to secure future advances. *Richards v. Merrimack & Connecticut River Railroad Co.*, 44 N. H. 127. In Ohio, by the use of apt words, property to be hereafter acquired may be conveyed by mortgage. *Coopers v. Wolf*, 15 Ohio St. 523. But the power to mortgage is limited to such property as the company could lawfully acquire. *Taber v. Cincinnati, Logansport, & Chicago Railroad Co.*, 15 Ind. 459. A trust deed is in legal effect a mortgage. *Coe v. Johnson*, 18 Ind. 218; *Coe v. McBrown*, 22 Ind. 252; *White Water Valley Canal Co. v. Vallette*, 21 How. 414. But in a late case in Maine a distinction was drawn between a trust deed, such as is provided for by the statutes of that state, and a mortgage; and it was held that the latter was within neither the letter nor the spirit of the provisions regarding the former. *In re York & Cumberland Railroad Co.*, 50 Me. 552. The power of a railway company to mortgage its property and the rights acquired by the mortgagee, are extensively discussed in a late case in Kentucky. *Bardstown & Louisville Railroad Co. v. Metcalfe*, 4 Met. Ky. 199. The court inclined strongly to sustain the power of mortgaging with all its incidents; but the decision of the case turned mainly on the construction of statutes.

sound decisions, in other fields of the law, reduces the question, so much discussed, to a distinction without substantial difference. See also *Randolph v. Wilmington & Reading Railroad Co.*, 11 Phila. 502. And for a full discussion of this question by the author, see *infra*, note 22.

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the company, if any exist upon the subject, or it will be voidable on their part.¹⁷

10. It has been held that the power "to buy or sell real estate," and the general right to borrow money, on the part of a corporation, imply the power to mortgage its property, real and personal, to secure the payment.¹⁸ (d) A right of way may be mortgaged for the security of money borrowed, and in default of payment may be sold and transferred to the purchaser; and it will make no difference that the title is acquired by another railway company, provided the original purpose and object of the grant be not thereby defeated or altered.¹⁹

11. And where the company receive the benefit of the money borrowed, they cannot avoid liability upon the mortgage given to secure its payment, by denying the authority of those who contracted the loan on their behalf.²⁰

* 12. But the deed of the shareholders will not convey the title of real estate which belongs to the company.²¹ And by parity of

¹⁸ *Susquehanna Bridge Co. v. General Insurance Co.*, 8 Md. 305. This is but an elementary principle in the law of corporations, and requires no citation of cases in its support. *Lucas v. Pitney*, 3 Dutcher, 221; *White v. Carmarthen & Cardigan Railway Co.*, 1 Hemm. & M. 786; s. c. 33 Law J. Ch. 93. But see *infra*, pl. 12. And even where the directors of a company have no power to borrow, money lent the company and *bona fide* applied for its benefit, may be recovered of the company. *In re Troup*, 29 Beav. 353; *Ex parte Hoare*, 30 Beav. 225. And see *Taber v. Cincinnati, Logansport, & Chicago Railroad Co.*, 15 Ind. 459.

¹⁹ *Junction Railroad Co. v. Ruggles*, 7 Ohio St. 1.

²⁰ *Ottawa Plank-Road Co. v. Murray*, 15 Ill. 336. And a mortgage may be ratified by a subsequent board of directors. *Hoyt v. Mining Co.*, 2 Halst. Ch. 253. But where the bonds of a railway company are pledged by the company as collateral security for their own indebtedness, smaller in amount than the par value of the bonds, and the pledgee still holds them, he is entitled to recover of the company no more than the amount secured by the pledge. *Jessup v. City Bank*, 14 Wis. 331. See also *In re Magdalena Steam Navigation Co.*, 1 Johns. Ch. Eng. 690.

²¹ *Wheelock v. Moulton*, 15 Vt. 519; *Bennington Iron Co. v. Isham*, 19 Vt.

(d) Unless restrained by statute *Kelly v. Alabama & Cincinnati Railroad Co.*, 58 Ala. 489; *Savannah & Memphis Railroad Co. v. Lancaster*, 62 Ala. 555. And authority to make a mortgage imports power to make the usual conditions. *Savannah & Memphis Railroad Co. v. Lancaster*, *supra*.

reason the deed, or mortgage of the property of the company, cannot transfer the corporate franchise, which is only made transferable by the general principles of the law of corporations, by the transfer of the shares. And this seems to be the most difficult question arising in regard to those mortgages of railway companies where their charter or the general laws of the state contain no special power enabling them to execute mortgages. The mortgage, as a mortgage of property, is valid, upon the general principles of the law of corporations. But as the corporate franchises reside in the shareholders, if the mortgagees foreclose, what title do they obtain, and how are they to make it available?²²

230. It was held in *Wells v. Rahway Rubber Co.*, 19 N. J. Eq. 402, that an insolvent corporation, after it has stopped business, cannot lawfully execute a mortgage or other transfer of its property, although the conveyance was voted before either of these contingencies occurred. It is held in *Pierce v. Milwaukee & St. Paul Railroad Co.*, 24 Wis. 551, that where a railway company was authorized by its charter to borrow money and to execute "such securities in amount and kind" as it might deem expedient, this would enable the company to mortgage its road, with its franchise and all its property both present and prospective. The company executed a mortgage, embracing the entire line of its road and all its property, rights, and franchises appertaining thereto; embracing its right of way and land occupied by the road, all rolling stock and other property appertaining to the road "then belonging to said company, or thereafter to be acquired, and all right thereto and interest therein, and also all future right thereto, therein," which said company should acquire. And the mortgage contained a covenant for all necessary further assurances as to the title of property thereafter acquired by the company. It was held that the instrument created a valid lien on all future acquired property by the company for the use of the road, and that this would cut off the vendors' lien on land thereafter sold to the company for the use of the road, and more especially after the foreclosure of such mortgage. See also *St. Paul & Pacific Railroad Co. v. Parcher*, 14 Minn. 297.

²² This is a subject of so much importance and difficulty, in this country at least, and so little has been decided in regard to it, that we desire to speak with the utmost circumspection and reserve, and not to be understood as having formed entirely settled opinions in regard to it. In addition to what will come more properly under another head, *infra*, §§ 239 *et seq.*, it must be acknowledged that while it is obvious that the franchise of a business corporation, like a bank, or a railway, possessing important public functions and fiduciary responsibilities, cannot at pleasure be assigned without the consent of the legislature, it has not seemed equally obvious that the *bona fide* mortgages of the entire property, business, and franchises of such a corporation, by virtue of a deed executed without such consent, could not, by the aid of a court of equity, obtain such control over the franchise of the corporation, as to enable them to make the foreclosure of their mortgage available. If this can-

* 13. In a case in New Hampshire,²³ by an act of the legislature, the Portsmouth and Concord Railway Company were * authorized not be done, it certainly argues a defect in the powers of a court of equity, of which heretofore there has not been much reason to complain.

In coming to this conclusion no account is taken of those cases where the

²³ *Pierce v. Emery*, 32 N. H. 481; s. c. 2 Redf. Am. Railw. Cas. 631. In this case, before the execution of the mortgage, the company owning a cargo of railway iron subject to the lien for duties agreed with the plaintiff that if he would pay the duties the company would lay the iron, and that if the amount so paid for duties were not paid within a specified time, he might take up the iron and hold it as security for the money advanced. It was held, that the iron having thus passed into the possession of the company, the lien was gone, and could not be asserted by the plaintiff against the mortgagees, but that the contract was valid between the parties; and that if the trustees had notice of it, and assented to the existence of such a right in the plaintiff at the time they took their mortgage, the contract would be binding in equity against the mortgagees and their assignees, the future holders of the bonds.

And in *Haven v. Emery*, 33 N. H. 66, decided at the same term, it was held, that the rails having been laid on a particular part of the road with a view to preserve the lien, and this having been known to the mortgagees at the time they took their mortgage, the rails did not become the property of the company until the price was paid, that being the terms of the contract by which they were delivered to the company, and that the rights of the mortgagees to any benefit from the iron thus obtained, like the rights of the company, depended on the payment of the price. This is the case of a mortgage executed subsequent to the laying of the rails, and the notice to the trustees was held sufficient to bind the bondholders, as in the former case. See also *Enders v. Board of Public Works*, 1 Grat. 364; *Hunt v. Bay State Iron Co.*, 97 Mass. 279.

But the doctrine that the property of a railway company necessary to operate the road cannot be attached, does not apply where the attachment is to enforce a specific lien which accrued on the acquisition of the property by the company without payment. *Hill v. La Crosse & Milwaukee Railroad Co.*, 11 Wis. 214; *Corry v. Londonderry & Enniskillen Railway Co.*, 29 Beav. 263; s. c. 7 Jur. N. S. 508.

And in England judgment-creditors of a railway company will be postponed to the holders of debentures secured by a prior mortgage. *Long v. Mathieson*, 2 Gif. 71; *Furness v. Caterham Railway Co.*, 27 Beav. 358. And the company will be restrained, at the instance of the mortgagees, from delivering legal possession of its lands and rails to a creditor who had constructed the railway, had obtained judgment against the company for his demand, and sued out an *elegit* upon it. *Furness v. Caterham Railway Co.*, *supra*. And the same principle is maintained under the Canadian statutes. *Herrick v. Vermont Central Railroad Co.*, 7 U. C. L. J. 240. And see *Aslet v. Farquharson*, 10 W. R. 458.

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to issue bonds, and to execute a mortgage to trustees, to secure the payment of such bonds, "of the whole, or a part, of * the real

grantees or assignees of a fishery, or other similar franchise, as in the case of ferries, *Briggs v. Ferrell*, 12 Ired. 1; *Bowman v. Wathen*, 2 McLean, 376, have been allowed to dispose of them, without restraint, the same as of any other property. *Watertown v. White*, 13 Mass. 477; *Felton v. Deall*, 22 Vt. 170; *Ex parte Fay*, 15 Pick. 243; *McCauly v. Givens*, 1 Dana, 261; *Phillips v. Bloomington*, 1 Greene, Iowa, 498. These are cases where there is no such extensive public trust growing out of the grant, and, by consequence, no implied obligation against a voluntary assignment. But the well-considered cases all concur in holding, that where this does exist, the franchise of corporate action is not alienable at will. Such is the fact in regard to the general duty of municipal corporations. So also where special trusts are conferred on such corporations, like that "to authorize the drawing of lotteries under their own supervision, for the purpose of effecting certain improvements," it is held, that this trust cannot be so exercised as to discharge the corporation from its responsibility, either by granting the lottery or selling the privilege to others, or in any other manner. *Clark v. Washington*, 12 Wheat. 40. So, as we have before seen, in § 142, in regard to railways. And we cannot regard the fact that the franchise of one corporation is allowed to be taken by another by virtue of the right of eminent domain, as any argument for the voluntary alienation of the franchise.

But the case of the mortgage of the entire property of a railway, consisting chiefly of the road-bed and the superstructure and accessory erections, with the rolling stock, which is also in some sense an accessory, if not a fixture, for a *bona fide* debt, without which the works could not have been completed, presents certainly a strong ground for equitable interference, to the extent of the just powers of the courts of equity.

And while it is apparent (*supra*, note 21) that the power to convey the franchise resides in the shareholders, and in terms is not technically transferred by the deed of the company, unless special power has been conferred on them for that purpose, still the mortgage of the entire property has so effectually transferred the beneficial use of the franchise, that it must operate a dissolution of the company and a reversion of the road-way to the land-owners, *Bingham v. Weiderwax*, 1 Comst. 509; 2 Kent Com. 305, 307; or the mortgagees must be allowed to exercise the powers of the corporation, so far as its business functions are concerned; or, what is equally at variance with the general law of business corporations, the entire mortgage must become practically inoperative.

The chief impediment in the way of carrying into effect railway mortgages, executed without express power from the legislature, is not that the corporation has not the power to execute such a contract, for, on general principles, it is universally conceded that the contract, where there is no restriction upon the company, is valid and binding; and it is settled in the English law that corporations, and especially railways and canals, may apply to the legislature for additional and enlarged powers, to enable them to carry into effect their

or personal estate of the corporation," and by the mortgage to give the trustees authority to sell "the real and personal * estate,

proper functions, interests, and undertakings. See *supra*, §§ 142, 212. And there is no apparent reason why this rule should not apply to railways in this country, since it is not an enlargement or qualification of the contract that is required, but power to render available a valid contract already existing. And as there is no question that the legislature might, in granting the charter or by a subsequent act, give the power to execute valid mortgages, not only of their property, which exists on general principles of law applicable to similar corporations, but of their corporate franchises also, so it must equally consist with the power of the legislature to ratify and confirm such a contract already existing, as it is not the consent of the corporators which is desired, so much as it is the assent of the sovereign to the transfer of public duties, conferred upon one person, to another. Hence there have been some decisions of the courts in this country confirming such mortgages executed without the consent of the legislature, on the ground of their recognition or express ratification by subsequent enactments of the legislature. On this ground was decided *Hall v. Sullivan Railroad Co.*, 21 Law Rep. 138 ; s. c. 2 Redf. Am. Railw. Cas. 621. *Shaw v. Norfolk County Railroad Co.*, 5 Gray, 162 ; s. c. 2 Redf. Am. Railw. Cas. is much to the same effect. And see *Coe v. Columbus, Piqua, & Indiana Railroad Co.*, 10 Ohio St. 372 ; s. c. 2 Redf. Am. Railw. Cas. 658, in which this subject is thoroughly examined, and which follows in the line of those already cited.

The remedy in the case of railway mortgages must depend, it is true, much on the form of the contracts, but there seems to be no more difficulty in so restraining the corporation, by proper orders in the court of equity, as to enable the mortgagee to obtain the benefit of his contract, when executed under the general powers of the corporation, than in appointing a receiver to distribute the receipts of the company, under the order of the court, for any other purpose; and that is every day's practice, in cases of indictment and conviction, and of unsatisfied judgments for debts or other liabilities, and in many other instances. And it must always be done in courts of equity, where there is an unsatisfied judgment or debt in that court against the company, and no other mode of enforcing it. Nor is there any special hardship in requiring the corporators to respect the rights of mortgagees under mortgages which have arisen in the due course of business, and by which corporations have obtained funds through agents of their own creation, by whose acts they should be bound to the extent of their corporate interests.

And even where an absolute foreclosure is allowed on such a mortgage there seems to be no actual injustice. There is, however, the superaddition of the technical title to the vital and exclusive franchises of the corporation, which was not included in the contract as originally executed, and could not be by the mere act of the corporation or its agents, without the intervention of the corporators or the legislature ; and although under the incumbrance the franchise must prove but a barren form if left in the hand of the corporation, as it is technically a right inherent in the corporators, it is not clear how

and all the rights, franchises, powers, and privileges named in the mortgage deed, or any part thereof;" and further provided, * that

it is to be absolutely foreclosed in a proceeding on a deed which confessedly does not include it. It seems that it would be more in accordance with the general course of decision in the English courts of equity, where the title to the franchise is not technically conveyed, to retain the case in court for the purpose of enabling the mortgagees to obtain enlarged powers from the legislature, not inconsistent with the duties they owe the company under the deed, and which shall go exclusively to affect the remedy. *Great Western Railway Co. v. Birmingham & Oxford Junction Railway Co.*, 2 Phillips, 597, opinion of Chancellor; *supra*, § 142.

In *Goodman v. Cincinnati & Chicago Railroad Co.*, 2 Disney, 176, the trustees of a mortgage of lands by the defendants brought a bill asking for a foreclosure and sale of the mortgaged premises, sufficient to satisfy the arrears of interest. The court, STORER, J., held the plaintiffs entitled to the prayer of their bill, both by the terms of their mortgage and on general principles of equity, aside from any express provision in the deed. The learned judge based his opinion of the general power of courts of equity to order sale of the mortgaged premises, to meet the payment of any instalment of principal due (or any arrears of interest, which he regarded as the same thing), on *King v. Longworth*, 7 Ohio, 231; *Stanhope v. Manners*, 2 Eden, 197; and *West Branch Bank v. Chester*, 11 Penn. St. 282.

As already said, some courts have held the franchise itself assignable on general principles. See *supra*, § 1, pl. 6. Mr. Justice McLEAN, in *Bowman v. Wathen*, 2 McLean, 393, said that in respect to the assignability of the franchise of a corporation "no difference is perceived between a ferry franchise, the franchise of a toll-bridge, a turnpike, or railroad, or any other franchise of the same nature," and at the same time held the ferry franchise assignable without the aid of a legislative act. And in *Bardstown & Louisville Railroad Co., v. Metcalfe*, 4 Met. Ky. 200, the court, though admitting that the corporate existence or the prerogative franchises cannot be mortgaged, hold that the right to build and use a railway is not a prerogative franchise, and that a purchaser under a railway mortgage may take and operate the road under the terms of its charter, and will be bound by the provisions of such charter. And the same doctrine is maintained in *Middlebury Bank v. Edgerton*, 30 Vt. 182, *per* BENNETT, J.

In *Drury v. Cross*, 7 Wal. 299, where the mortgagees made a sale of the road and its furniture and franchises, under a deed of foreclosure, by arrangement with the directors of the company, by which they escaped responsibility on their indorsements for the company, and the price was below the real value of the property, the purchasers were decreed trustees for the creditors suing for the full value of the road, less the sum paid by them for the lien of others, which they had purchased at a discount.

In *Enfield Toll-bridge v. Hartford & New Haven Railroad Co.*, 17 Conn. 40, WILLIAMS, C. J., in giving judgment, says: "What are the rights of the plaintiffs? They are derived from the grant of the legislature, and are what

the deed of the trustees upon such sale should convey to the purchasers "all the real and personal estate named in said mortgage-

in law is known as a franchise; and a franchise is an incorporeal hereditament, known as a species of property as well as any estate in lands. It is property which may be bought and sold, which will descend to heirs, and may be devised. Its value is greater or less, according to the privileges granted to the proprietors." And this is but the repetition of the elementary definitions of a franchise found in the earliest text-writers of the English common law. But in *Pierce v. Emery*, 32 N. H. 504, s. c. 2 Redf. Am. Railw. Cas. 631, PERLEY, C. J., says, in regard to the rights of public railways: "They cannot convey away their franchise and corporate rights, nor perhaps the track and right of way, which they take and hold for the necessary use of their road. . . . But they may contract debts, may purchase on credit; and we see nothing in the nature of their business, or in their relation to the public, which should prevent them from making a valid mortgage of their personal property, not affixed to the road, though used in the operation of it." The same view is maintained in *State v. Mexican Gulf Railroad Co.*, 3 Rob. 513.

In *Arthur v. Commercial & Railroad Bank*, 9 Sm. & M. 394, it is held, that the franchise of a railway cannot be sold or assigned without the consent of the power which granted it. It is a mere easement, not the subject of sale. If the road be sold or assigned the franchise does not pass with it, nor is the corporation thereby dissolved, though it might be ground of forfeiture if insisted on by the state. *State v. Commercial Bank*, 13 Sm. & M. 569. But an act of the legislature, authorizing the trustees under a railway mortgage to sell the railway, is a ratification of the mortgage, so far as the state or public is concerned. *Richards v. Merrimack & Connecticut River Railroad Co.*, 44 N. H. 127.

In *State v. Commercial Bank*, 13 Sm. & M. 569, there was a general assignment for the benefit of creditors, and for the completion of the road, of all the property of the plaintiffs. The court held such assignments valid on general principles, and that this was valid, except that it was indefinite in time, and to last until the debts were paid, when the fee of the road was to revert to the corporation; and that therefore the tendency of the assignment was to lock up the estate indefinitely, to create a perpetuity, to hinder and delay creditors, and to secure an ultimate and permanent advantage to the corporation; and was, therefore, void. The charter authorized the company to hold the estate in lands necessary for its road-bed and incidental uses in fee-simple. The court said: "If the estate be one in fee, we do not see why it is not the subject of assignment or sale on execution." Whether the estate in fee, or only the accruing profits, passed by the assignment, the court did not decide, as either was sufficient to uphold the deed. But there seemed to be no question that the one or the other did pass by the assignment, but for the terms of the deed being against law, and on that account void. It was also said that whether or not a corporation, with a railway franchise, had power to convey away the railway and the franchises attached, was a matter between the state and the corporation with which third persons have nothing to do. This sug-

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deed, * together with all the rights, franchises, powers, and privileges in relation to the same " which the corporation had at * the

gestion is not without force. It is certainly in analogy to other cases, where a corporation is guilty of abuse of its privileges, on the ground of which the state might enforce a forfeiture of its franchises. This is not a question which can be raised collaterally, or at the suit of one who has no direct interest in the question. The state may waive any such forfeiture, and until it enforces it, the debtors of the corporation cannot insist on it. See *infra*, § 242. And much less should the corporation be allowed to shield itself behind the violated rights of the state, of which no complaint is made, and thus escape the legitimate effects of its own contracts. And see *Richards v. Merrimack & Connecticut River Railroad Co.*, 44 N. H. 127; *Chapin v. Vermont & Massachusetts Railroad Co.*, 8 Gray, 575.

In *Commonwealth v. Smith*, 10 Allen, 448; s. c. 1 Redf. Am. Railw. Cas. 578, it was held that a corporation is not authorized at common law to mortgage its franchise of operating its railway and carrying freight and passengers without some further authority. But in *Hendee v. Pinkerton*, 14 Allen, 381, it was held that a railway corporation, having authority to hold land for depots and storehouses as well as for railway purposes, and to allow other railways to establish depots on its premises, and sell or lease the land necessary therefor, but having no express authority to create mortgages on its property, may lawfully mortgage lands held by it, and not required for railway purposes, to secure its bonds. And it was further held that if the mortgage embrace lands which the corporation had no authority to mortgage, with others over which it had authority, the mortgage might be upheld as to the latter only. And in *Richardson v. Sibley*, 11 Allen, 65, it was decided that a street railway corporation has no power to mortgage its property, franchise, or road without legislative authority. Since the statute of 1854, c. 286, railway corporations have no power in Massachusetts to issue bonds, except for the purposes and in the mode therein authorized; and all bonds issued otherwise are void, and a mortgage to secure them is also void. And where such bonds have been issued and secured by such an invalid mortgage, although the railway company itself does not seek to avoid the obligation, a holder of a second mortgage may take advantage of the defect. *Ib.* But in Maine, the court, in two cases, seems to hold that there is no reason why a railway company should be compelled to show the express ratification by the legislature of its power to mortgage its property and railway franchises to secure its debt, more than any other person, natural or artificial. *Shepley v. Atlantic & St. Lawrence Railroad Co.*, 55 Me. 395; *Kennebec & Portland Railroad Co. v. Portland & Kennebec Railroad Co.*, 59 Me. 9. It was held in the latter case that a valid foreclosure of a railway mortgage might be made under a statute passed after the execution of the mortgage and after some portion of it became due. See also *Atkinson v. Marietta & Cincinnati Railroad Co.*, 15 Ohio St. 21.

This question has been raised and considered in still other cases. See *Dunham v. Isett*, 15 Iowa, 284; *Commonwealth v. Smith*, 10 Allen, 448; *Jackson v. Brown*, 5 Wend. 590; *De Ruyter v. St. Peter's Church*, 2 Comst.

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time of the mortgage; and that the purchasers should thereby acquire "all the rights, franchises, powers, and privileges, which * said corporation possessed, and the use of said railway, with all its property and rights of property, for the same purposes and to * the same extent that said corporation could use the same, if said deed had not been made subject to the same liabilities as to the * use of said railway that said corporation would be under if said deed had not been made; and that the directors should have power, * notwithstanding the mortgage, to sell and dispose of any of the personal property of said corporation, provided they should purchase, * with the proceeds thereof, other property to an equal amount, which should be held by the trustees under the mortgage, * in the same manner as if the same had been owned by the corporation, at the time of the execution of the mortgage, and specifically included therein."

* The directors made a mortgage to trustees appointed under the act, conveying "the railroad of said corporation, together with all * its powers, rights, franchises, and privileges, with all the lands, buildings, and fixtures thereto belonging, or which may hereafter * thereto belong, with all the rights, franchises, powers, and privileges now belonging to, and held, or which may hereafter belong * to, or be held, by said corporation, and all the personal property of said corporation, as the same now is in use by said corporation, or as the same may hereafter be changed and renewed by said corporation." * And the mortgage gave the trustees power to sell the road under the mortgage, in certain contingencies, and to execute a deed, that should pass to the purchasers "all the property, real, personal, and mixed, rights, powers, franchises, and privileges of this corporation." It was held, that although as a general rule nothing can be mortgaged that does not at the time belong to the mortgagor, that the statute in this case authorized the directors to make a mortgage, not only of the existing property of the road, but of the corporate

238; *Gordon v. Preston*, 1 Watts, 385; *Bardstown & Louisville Railroad Co. v. Metcalfe*, 4 Met. Ky. 199; *Central Bridge Co. v. Bailey*, 8 Cush. 319; *Jouitt v. Lewis*, 4 Littell, 160; *Enders v. Board of Public Works*, 1 Grat. 364. And see *Vilas v. Milwaukee & Prairie du Chien Railroad Co.*, 17 Wis. 497; *Smith v. Chicago & Northwestern Railway Co.*, 18 Wis. 17. The general professional opinion in 1857 is shown by *Grinnell v. Sandusky, Mansfield, & Newark Railroad Co.*, cited in *Pierce Railw.* 512.

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rights and franchises, and of the railway itself as an entire thing; that the trustees under such a mortgage would hold subsequently acquired property as an incident to the franchise mortgaged, and as an accession to the subject of the mortgage;²⁴ that the trustees under the mortgage in this case were entitled to hold personal property, acquired by the road after the mortgage, against subsequent mortgagees of the specific property so acquired. (e)

It seems to be now (1869) well settled, that to the creation of a valid and effective railway mortgage the consent of the legislature is indispensable. But this may be obtained either before or after the creation of the mortgage, and may be by express enactment or by implication;²⁵ and is so much matter of course to be granted upon request that it cannot be regarded as any serious impediment in the way of carrying into effect a simple mortgage.

14. In the Court of Appeals in Kentucky, in the summer of 1856, it was decided, that when the statute of the state where a loan was obtained deprived the company of all defence, under the plea of usury, the creditors and subsequent mortgagees could not plead usury in defence of the mortgage given to secure the loan.²⁶

²⁴ See to same point *Coe v. McBrown*, 22 Ind. 252; *Pennock v. Coe*, 23 How. 117.

²⁵ See opinion in *Commonwealth v. Troy & Greenfield Railroad Co.*, in 10 Allen, 448; s. c. 1 Redf. Am. Railw. Cas. 578.

²⁶ *First Mortgage Bondholders v. Maysville & Lexington Railroad Co.*, 9 Am. Railw. T. No. 31. There really is no difficulty on general principles in allowing the mortgage of a specific thing to carry along with it, or as incident, subsequent accessions, as the natural increase of animals or the crops raised on land. This is nothing more in principle than allowing the mortgagee to take the benefit of the growth of animals, or of crops, or the advance of market value. *Smith v. Atkins*, 18 Vt. 461. The rule of law which forbids the sale or mortgage of property not *in esse*, is merely technical, and never had any existence in equity, or certainly was never generally maintained in that court. But in *State v. Mexican Gulf Railroad Co.*, 3 Rob. La. 513, it is held that a railway, where the soil on which it is laid belongs to another, "the owners not having been expropriated," is not susceptible of being mortgaged, unless authorized by the legislature, and that future property can never be the subject of conventional mortgage. But it has been held in Pennsylvania that a mortgage by a corporation of its franchises, property, and effects, given after entry on lands and before judgment for damages, will bind its equitable interest therein, subject to the payment of the judgment for the purchase-money; and that on a distribution of the sheriff's sale of the land, after the satisfac-

(e) As to mortgages of after-acquired property, see *infra*, note (f).

* And in the same case it was held, that where the road was built and most of the property of the company was acquired, subsequent

tion of such judgment, the balance passed under a prior mortgage in preference to one executed after the entry of the judgment and the consequent vesting of the legal title in the company. *Easton's Appeal*, 47 Penn. St. 255. Where the corporation possesses full legislative authority to mortgage and execute the deed in terms extending to future acquisitions, it will be held valid both as to the rolling stock and after-built structures. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Woelpper*, 64 Penn. St. 366.

And in *Farmers' Loan & Trust Company v. Hendrickson*, 25 Barb. 484, it was decided, on argument and elaborate examination, that the rolling stock of a railway, such as cars, tenders, and locomotives, is accessory to the real estate, and passes by deed as a fixture or necessary incident; that railway mortgages including the rolling stock need not be filed as chattel mortgages; and that bondholders, under a mortgage not so filed, are entitled to the rolling stock, as against judgment creditors.

A somewhat similar doctrine is maintained in *Palmer v. Forbes*, 23 Ill. 300; *Hunt v. Bullock*, 23 Ill. 320; *Pennock v. Coe*, 23 How. 117; s. c. 2 Redf. Am. Railw. Cas. 667. The opinion of STRONG, J., in *Hendrickson's* case is certainly plausible, and it is impossible to say that the views there maintained will not, or may not, ultimately prevail. There are, no doubt, justice and convenience in such a view. But it seems like a departure from the general law of fixtures in this country, and at variance with generally received notions upon that subject. As between the mortgagor and mortgagee, and all subsequent incumbrancers having knowledge of the prior deed, there is no difficulty in allowing the rolling stock of a railway to constitute part of the mortgage of the road, and thus to include the renewals of such stock from time to time, and even additions. But it is not easy to comprehend how a locomotive engine and train of cars is any more a fixture than any other machine operated by steam, or than a stage-coach even. But see *State v. Northern Railroad Co.*, 18 Md. 193; *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207; *Hoyle v. Plattsburg & Montreal Railroad Co.*, 51 Barb. 45. See *infra*, notes 31, 33. The contrary doctrine was held in *Stevens v. Buffalo & New York City Railroad Co.*, 31 Barb. 590; *Bement v. Plattsburgh & Montreal Railroad Co.*, 47 Barb. 104; s. r. *Beardsley v. Ontario Bank*, 31 Barb. 619, where the rule of personality was made to include locomotive engines and other rolling stock, the materials, such as ties, rails, and other things on hand for repairing the railway, platform scales, tools, and implements, and all articles not constituting a part of the road-bed, or firmly fixed to the land or some building which is itself a fixture, including such articles as are usually regarded as personal estate, but which may be affixed to some building by screws, but which may be removed from it without detriment either to the building or the article. And on general principles it seems that a general mortgage of the road and its franchises will not carry after-acquired rights in real estate: *Western Pennsylvania Railroad Co. v. Johnston*, 59 Penn. St. 290; nor after-acquired personality: *Bath v. Miller*, 53 Me. 808.

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* to the execution of the mortgage, although such property could not be held at law, it might be in equity, and a foreclosure was accordingly allowed in regard to the subsequently acquired property. (*f*)

* And in the state of New York, where the legislature provided that railway corporations may, from time to time, borrow such sums of money as may be necessary for finishing their roads, or operating the same, and may issue bonds for the amount,

(*f*) It seems now to be settled that mortgages by railroad companies of after-acquired property are valid in equity. *Little Rock & Fort Smith Railroad Co. v. Page*, 35 Ark. 304; *Meyer v. Johnston*, 53 Ala. 237; *Buck v. Seymour*, 46 Conn. 156. And see *Quincy v. Chicago, Burlington, & Quincy Railroad Co.*, 94 Ill. 537. And they are to be construed upon the principles applied in the construction of like instruments by natural persons. *Mississippi Valley Co. v. Chicago, St. Louis, & New Orleans Railroad Co.*, 58 Miss. 596. Such a mortgage covers income or net earnings. *Addison v. Lewis*, 75 Va. 701. And see *Pullan v. Cincinnati & Chicago Air Line Railroad Co.*, 5 Bissel, 237; *Tompkins v. Little Rock & Fort Smith Railroad Co.*, 15 Fed. Rep. 6. But at law it cannot be regarded as covering money earned in carrying for an express company under a contract subsequent to the mortgage. *Emerson v. European & North American Railway Co.*, 67 Me. 387. It will cover after-acquired lands, but not if, at the date of the mortgage, the company has no power to acquire lands. *Meyer v. Johnston*, 53 Ala. 237. Nor unless they are described with reasonable certainty, except where they are used in connection with the actual operations of the road and as a part thereof. *Calhoun v. Memphis & Paducah Railroad Co.*, 2 Flippin, 442. But see

Hamlin v. European & North American Railway Co., 72 Me. 83. It will cover property used on a leased line. *Buck v. Seymour*, *supra*. It will cover also a road in contemplation and subsequently built, though built on a route different from the route surveyed, but in the same general direction. *Meyer v. Johnston*, 53 Ala. 237. And when it extends in terms to roads to be built, it will cover a branch road, though not in contemplation when the mortgage is executed. *Coe v. Delaware, Lackawanna, & Western Railroad Co.*, 34 N. J. Eq. 266. Or a road purchased, but lying within its chartered limits. *Branch v. Atlantic & Gulf Railroad Co.*, 3 Woods, 481. But not a subsequent extension into another state under a subsequent act of legislation. *Randolph v. New Jersey West Line Railroad Co.*, 28 N. J. Eq. 49. And see *Coe v. New Jersey Midland Railway Co.*, 31 N. J. Eq. 105. But such a mortgage attaches to such interest only as the mortgagor acquires. *Williamson v. New Jersey Southern Railroad Co.*, 29 N. J. Eq. 311. It displaces no existing liens. *Branch v. Atlantic & Gulf Railroad Co.*, *supra*. Whether existing mortgages or mortgages or liens to the vendor or others to secure payment of the purchase-money. *Loomis v. Davenport & St. Paul Railroad Co.*, 17 Fed. Rep. 301; *Coe v. Delaware, Lackawanna, & Western Railroad Co.*, *supra*.

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and mortgage their corporate property and franchises to secure the payment, and a railway company, in pursuance of the statute, executed a mortgage of their road, constructed and to be constructed, together with all and singular the railways, rails, &c., rights and real estate now owned, or which shall hereafter be owned, by them; it was held to include all the property and rights of the company, and to be in conformity with the act.²⁷ And it was further held, in this case, that the mortgage included a branch track, not projected or contemplated at the time of the original location, as an incident to the principal grant. But land held by the company for any other than legitimate railway purposes, will not pass by such mortgage.²⁷

And where the directors of a railway company set apart the future earnings of the company in payment of interest on its bonds, secured by mortgage on its road and franchises, and to raise a sinking fund for the redemption of such bonds, it was held that such money was not liable to be reached by the general creditors of the company through garnishee process.²⁸ Nor would such earnings be liable to such process where they had been pledged for that purpose by the mortgage.²⁸

* 15. In an important case,²⁹ where the subject seems to have received a very patient and understanding consideration, by counsel and by the Chancellor, it is held, that a mortgage of a canal, described by its extreme termini with all the accompanying works, executed by virtue of a general power in a statute for that purpose, conveyed the entire canal when completed, although a portion of it was constructed upon land acquired after the execution of the mortgage, and was built after the date of the mortgage; and that the feeder of the canal passed by the mortgage as part and parcel thereof.

But a mortgage by the company of all the property in any way belonging to or connected with the railway, enumerating cars, engines, &c., will not include canal boats purchased with the funds of the company, and run by it in connection with, but be-

²⁷ *Seymour v. Canandaigua & Niagara Falls Railroad Co.*, 25 Barb. 284; *S. P. Phillips v. Winslow*, 18 B. Monr. 431.

²⁸ *Galena & Chicago Union Railroad Co. v. Menzies*, 26 Ill. 121.

²⁹ *Willink v. Morris Canal & Banking Co.*, 3 Green Ch. 377. It is here said, that the grant of the power to execute a mortgage implies a mortgage with all its incidents, including the power of sale.

yond the limits of the road. And where it was attempted to deny the title of such mortgagees to use such property by the consent of the company under such mortgage, on the ground of the illegality of the purchase of it by the company, the act being *ultra vires*, it was held that such question could not be raised by one deriving title from the company as against another party whose title originated from the same source. The title of the company is good against any one but the public, or until process of divesting it is sued against them in some mode.³⁰

16. In one case (1857) before the Circuit Court of the United States, Mr. Justice McLEAN in the course of his opinion assumes, that railway mortgages may be so drawn as to bind the subsequently acquired property of the company; that the franchise of operating the road, and taking toll, or fare, and freight, passes by the mortgage, and may be sold under the mortgage, containing a special clause to that effect; that the power of sale contained in the mortgage does not preclude the trustee from coming into a court of equity to obtain a foreclosure of the title of the mortgagor, and sale; that the suit is rightfully brought in the name of the trustees, without joining the bondholders; that the appointment of a receiver * in such cases is matter of discretion with the court of equity; that it is not matter of course, upon default of payment of interest, but must depend upon the question of the safe and prudent management of the property by the company, and the probability of the interest being speedily liquidated.

It was further said, that where an expenditure has been made of the current income of the road, and considerable debt incurred in completing the road and equipping it, under the advice of the trustee and a considerable number of the bondholders, such use of the funds will not be considered a misapplication. As it greatly increased the security of the bondholders, and added to the profit of the road, these facts, under the circumstances, do not authorize the appointment of a receiver.³¹

³⁰ *Parish v. Wheeler*, 22 N. Y. 494. The company, in such case, is liable for money borrowed to pay for such property, and those to whom it sells or mortgages the property are liable to account. *Ib.*

³¹ And in *Nichols v. Perry Patent Arm Co.*, 3 Stock. 126, it is laid down that the appointment of receivers is not a matter of course following on a decree of the court declaring the corporation insolvent. It is a matter resting in

The case was retained, under an order that the company should make return to the court of the amount of their net earnings, one half of which should be applied to the extinguishment of interest, and the other half to the floating debt of the company. But if at any time it shall appear that the company disregard the order, or is becoming insolvent, a receiver will at once be appointed.³²

* The case does not show whether the mortgage was executed by virtue of a power conferred by the legislature. But it is believed * the general statutes of Ohio allow such contracts, and the opinion certainly confirms the general views we have taken upon the subject, * both as to the extent and the form of the remedy; and in both particulars it receives strong confirmation from the elaborate and * thorough opinion of Mr. Justice CURTIS, referred to in note 23 of this section.

* In regard to the bill being brought in the name of the trustees, without joining the bondholders, there can be, we think, no just * ground for any difference of opinion upon the proper application of the most familiar principles of equity law.

* In regard to the right of foreclosure, that must depend upon the provisions of the deed. But if it be technically a mortgage, it will entitle the mortgagees to foreclosure,³³ whether it contain a power of sale or not, that being but a cumulative remedy.

If it be what has been called a Welsh mortgage, or *vivum vadium*, or a provision for liquidating the debt out of the avails

the discretion of the Chancellor. But as a general rule, where there is a decree of insolvency, receivers will be appointed. The management of the affairs of the corporation will not be left in the hands of the directors, unless it is shown that it is for the interest of the creditors and stockholders that this should be done. *Ib.*

³² *Williamson v. New Albany & Salem Railroad Co.*, 9 Am. Railw. T. No. 37; s. c. 2 Redf. Am. Railw. Cas. 682.

But see *Taber v. Cincinnati, Logansport, & Chicago Railroad Co.*, 15 Ind. 459; *Bank Commissioners v. Rhode Island Central Bank*, 5 R. I. 12. In *Ludlow v. Hurd*, 1 Disney, 552, the subject of the right of general creditors to levy on the furniture and rolling stock of a railway, as against prior mortgagees, is very learnedly and sensibly discussed by STORER, J.

³³ And the equity of redemption will also subsist for the protection of the mortgagor. And in a late case in Maine it was held, that where a railway company, owning a railway lying in two different states, under charters from each of those states, mortgages its whole road and franchise, and its right to redeem in one state is sold on execution, the purchaser of the equity is entitled

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of the property, the more appropriate course will be the appointment of a receiver, or transferring the road into the power and control of the trustees, for the benefit of the bondholders, subject to accountability before the courts of equity.

In another case³⁴ in the United States Circuit Court for the to redeem the whole road from the mortgage. *Wood v. Goodwin*, 49 Me. 280.

³⁴ *Coe v. Pennock*, 6 Am. Law Reg. 27; s. c. 2 Redf. Am. Railw. Cas. 667.

In the case of *Phillips v. Winslow*, 18 B. Monr. 431, 445, it was held that the power to pledge the franchise of a railway company implies the power to pledge everything necessary to the enjoyment of the franchise, and the conveyance of the road-bed with the superstructure and rolling stock includes cars, wheels, firewood obtained for the use of the engines, and coal for the use of the machine-shop, as incidents.

In *Dunham v. Earl*, in the Circuit Court for the District of Michigan, it was held, on motion for an injunction against the sale of the personal property of the company, at the suit of one of the mortgagees, that under a railway mortgage (including the railway and its appurtenances), engines, cars, and all rolling stock and personal property, which the company possessed at the date of the mortgage, as well as all after-acquired property, wood collected for the use of the engines, &c., was held under the mortgage. The same views were also maintained in *Loudenschlager v. Benton*, 3 Grant Pa. 384, in which it was further decided that where there is a question in the case whether the company had power to mortgage, the court, without deciding this point on a motion for a special injunction, will enjoin creditors and the sheriff from proceeding to sell property covered by the mortgage, but will also cause the lien of the *fi. fa.* to be continued till further order.

In *Coe v. Peacock*, 14 Ohio St. 187, it was held that a railway company may effectually mortgage its property, real or personal, connected with the use of its franchises, but afterwards to be acquired; but that the existence of such a mortgage does not operate to exempt such property, in its nature personal, and while in the possession of the corporation, from being levied on by the judgment creditors of the company. And see *Coe v. Columbus, Piqua, & Indiana Railroad Co.*, 10 Ohio St. 372; s. c. 2 Redf. Am. Railw. Cas. 658; *Coe v. Knox County Bank*, 10 Ohio St. 412. And in Massachusetts the right to mortgage subsequently acquired property has been recognized. *Howe v. Freeman*, 14 Gray, 566. See also *State v. Northern Railroad Co.*, 18 Md. 193.

And see *Coe v. McBrown*, 22 Ind. 252; *Farmers' Loan & Trust Co. v. Commercial Bank*, 15 Wis. 424.

But in *State Treasurer v. Somerville & Easton Railroad Co.*, 28 N. J. Law, 21, where a tax of one-half of one per cent was imposed annually on the cost of the road, it was held that this did not include the equipments, cars, engines, and other personal property of the company. And in New York, as before stated, it has been held that rolling stock, rails, ties, platform scales, &c., and all articles not constituting a part of the road-bed, or firmly affixed

* northern District of Ohio, before the same learned judge, the following points were decided, wherein the same questions to some extent are further illustrated. * A mortgage given on the entire property of a railway including future receipts for transportation, with an agreement that property * on the road subsequently acquired shall be bound, and a conveyance of it be duly executed, gives an equitable lien on property * subsequently acquired, to the holders of bonds secured by the mortgage. * A charter must be construed according to the intent of the legislature, if such intent can be ascertained, by the language used. A person who constructs cars or other rolling stock for a railway, if he deliver the same to the company without any special provision therefor, can claim no lien thereon. He may effect this lien while this work is in his possession. And if he obtain a judgment against the company for the work, an execution cannot be levied on the rolling stock on which a former lien existed. Where there are liens on the property of a railway company, the liens must be adjusted in chancery, where each claimant shall receive his proportionate share of the proceeds. The appointment * of a receiver is generally ruinous, and a sale of such property should not be made under a reasonable prospect of payment, by a faithful application of the profits of the road.

17. It was held that a judgment creditor and debenture holder of a railway company, was neither entitled to a foreclosure or sale. The Master of the Rolls said: "There could be neither a sale nor foreclosure; but the plaintiff might possibly be entitled to be relieved from the burden of accounting as an incumbrancer in possession." — "That all he could do at present was to direct inquiries as to what was due the plaintiff, what charges there were on

to the land or to some building which is itself a fixture, including such articles as are usually denominated chattels, but which are annexed by a screw or the like to some building, and can be removed without detriment, not including a stationary engine and boiler, are not embraced in a mortgage of the railway, real estate, chattels real, and franchises of the company, but are subject to execution as personal property. *Beardsley v. Ontario Bank*, 31 Barb. 619. And unless a mortgage of the rolling stock, &c., is filed as a chattel mortgage under the statute, a purchaser under a judgment sale, even though notified of the mortgage, takes the property in New York clear of such incumbrance. *Stevens v. Buffalo & New York City Railroad Co.*, 31 Barb. 590.

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the railway and their priorities, and what, if anything, was due the land-owners, and what lands were subject to their lien." ⁸⁵

18. Where a mortgage covering a railway and all apparatus was *executed, and three hundred of the bonds issued before the road was wholly graded, and when no more than one-fourth of the cost of construction had been expended, and while in that state the company, being unable to finish the construction, contracted with some third party to do it, under a contract to pay him partly in their bonds and partly in money, and with an agreement that he should retain the possession and use of the road and its fixtures, &c., until paid; it was decided, in equity, that

⁸⁶ *Furness v. Caterham Railway Co.*, 25 Beav. 614, 619. But where one had levied under an *elegit* on the lands of a railway company, the court directed inquiries, and if debt and costs were not paid within one month, that sale be made, under the direction of the court, of so much lands of the company as were necessary to satisfy the claim. *In re Hull & Hornsea Railway Co.*, Law Rep. 2 Eq. Cas. 262. And after the appointment of a receiver of a railway, in a suit on behalf of debenture holders, a debenture holder recovered judgment, and petitioned for leave to issue execution. It was held that he was not entitled to execution except as trustee for all the debenture holders entitled to be paid *pari passu* with himself, but an inquiry was directed whether it would be advantageous to the debenture holders for the receiver to take any proceedings to make the judgment available for them. *Bowen v. Bacon Railway Co.*, Law Rep. 3 Eq. Cas. 541. Where a railway mortgage provides for compensation to the trustees for their services and expenditures that should be allowed, but will not embrace fees paid to counsel in suits between them and the mortgagors, or premiums for insurance procured by them without the request of the mortgagors. *Boston & Worcester Railroad Co. v. Haven*, 8 Allen, 359.

The trustee of a railway mortgage, where the road extends through two states, may be compelled by the courts of one of these states having jurisdiction of his person, to sell whatever interest of the company passed under the mortgage. *McElrath v. Pittsburg & Steubenville Railroad Co.*, 55 Penn. St. 189.

A provision in a railway mortgage for the payment of the coupons and the debt, without any deduction, defalcation, or abatement of anything for or in respect of any charges, taxes, or assessments whatever, does not oblige the company to pay the income tax thereon, due from the holder of the coupons under the United States revenue laws.

The courts of Vermont have decided that interest coupons attached to the mortgage notes of a railway company form part of the mortgage debt, and that when detached, a court of equity will enforce the payment of them by the company in connection with the mortgage. *Sennot v. Brainerd*, 38 Vt. 364; *Miller v. Rutland & Washington Railroad Co.*, 40 Vt. 399. See also *Wright v. Ohio & Mississippi Railroad Co.*, 1 Disney, 405.

the contractor acquired a lien prior to that of the mortgage to the extent of his expenditures.⁸⁶ (g)

19. There is a recent case⁸⁷ of which it seems necessary to give a somewhat extended note. A railway corporation contracted with the plaintiff to build and equip their road, and gave him a conveyance of their interest and property therein, upon condition to pay all the bonds and coupons issued to him by vote of the directors, and in fulfilment of the contract for construction and equipment of their road, the deed to become void on full performance on their part, but otherwise in full force, the possession to remain in the grantors so long as they continued to perform their undertaking; but, upon failure in any respect for sixty days, the plaintiff was authorized to take possession of all the mortgaged estate, real or personal, rights of way or corporate franchises, for the joint benefit of all the bondholders, whether due or not, who were declared entitled to share equally in the avails of the same on sale, at public vendue, on reasonable notice to the grantors, first deducting all costs and expenses incident to the possession and sale. The court held, that the instrument was not a deed of trust, but a mortgage; that after a transfer by plaintiff of any of the bonds of the corporation, he held the legal title as mortgagee for his remaining interest, and in trust for the other bondholders; that the contract was secured by the mort-

⁸⁶ *Dunham v. Cincinnati, Peoria, & Chicago Railroad Co.*, 13 Railw. T. 839. The transfer of the rolling stock of a railway is valid against an execution creditor of the company. *Blackmore v. Yates*, Law Rep. 2 Exch. 225.

⁸⁷ *Mason v. York & Cumberland Railroad Co.*, 52 Me. 82.

(g) But a lien for advances made to enable a company to complete construction will be postponed to that of mortgage bondholders, unless the advances were made by reason of acts, promises, &c., of all the bondholders. *Kelly v. Green Bay & Minnesota Railroad Co.*, 5 Fed. Rep. 846. But see *Langdon v. Vermont & Canada Railroad Co.*, 58 Vt. 228.

The decisions present some questions of priority between holders of bonds of the same or different issues. In *Stanton v. Alabama & Chattanooga Railroad Co.*, 2 Woods, 523, it was

held that numbered mortgage bonds issued in excess of a proposed amount per mile of the road, stood on the same footing with bonds within the limit, the bonds being in the hands of *bona fide* holders, and all maturing at the same time, the numbers not affecting the question of priority. And see *Claffin v. South Carolina Railroad Co.*, 4 Hughes, 12. In *Humphreys v. Morton*, 100 Ill. 592, it was held that in the absence of special provision bonds secured by the same mortgage take priority according to the dates on which they mature.

gage; that the bonds have priority of payment from the proceeds of the mortgaged property over the contract; that the conveyance contains no valid power of sale of the mortgaged property; * that a sale by the mortgagee of all his right, title, and interest in the mortgage, and in a judgment recovered by him against the corporation for non-fulfilment of the contract, is an assignment of the mortgage, and the assignees hold the estate in the same manner as he held it; that subsequent conveyances by the railway corporation cannot affect the rights acquired by virtue of the mortgage; that the court will not determine what particular bonds are secured by the mortgage until the report of the master, to whom the case will be sent for that purpose; that bonds not issued by the previous specific vote of the directors, but afterwards ratified and approved by the corporation, and received by plaintiff, and applied in accordance with the terms of the contract, are secured by the mortgage; that the claim of an indorser of the company's notes, the proceeds of which were applied in part performance of the contract, is not secured by the mortgage; that one bondholder may maintain a bill in equity to enforce payment of the bonds in his own name, but for the benefit of himself and all the other bondholders; but that in such a case the court cannot properly examine and determine the rights of one claiming an interest in the judgment on the contract as equitable assignee, or as having an equitable claim upon it.

20. The mortgagee of railway property may be restrained by injunction from removing portions of the property, although the security be inadequate. The proper remedy in such case is by foreclosure.²⁸ Where the terms of a railway mortgage provided that, in the event of the corporation failing to meet the payment of the debt and interest promptly, it should be competent for the mortgagees to take possession of the road, fixtures, and other property so mortgaged, and manage and control the same, and apply the net earnings in payment of the debt; the court held it was competent to decree specific performance of this portion of the contract.²⁹

²⁸ *Lane v. Baughman*, 17 Ohio, 642. Form of procedure in such cases. *Kennebec & Portland Railroad Co. v. Portland & Kennebec Railroad Co.*, 54 Me. 173.

²⁹ *Shepley v. Atlantic & St. Lawrence Railroad Co.*, 55 Me. 395; s. c. 2 Redf. Am. Railw. Cas. 687.

21. In the United States Supreme Court,⁴⁰ where certain bondholders under a junior mortgage upon a railway purchased, for the benefit of all the bondholders, the property at a sale by the trustee named in the mortgages, and thereafter organized themselves into a new corporation, as the laws of the state allowed, and took possession and operated the road, and subsequently a prior mortgage upon the road was foreclosed and the new corporation paid the amount of the mortgage, as owners of the road, the same amounting to more than \$400,000, and proceedings were thereafter taken by the creditors of the original corporation to impeach the sale under which the title of the new corporation was derived, and the same was set aside as fraudulent, this latter suit being pending when the new corporation paid the mortgage, it was held that the new corporation had no equitable claim to be reimbursed the money paid to, or to be subrogated to the rights of the mortgagees, on the ground that the money was paid under no mistake of fact, but only a mistake of law.

⁴⁰ *Milwaukee & Minnesota Railroad Co. v. Soutter*, 13 Wal. 517, CHASE, C. J., and MILLER and FIELD, JJ., dissenting. This decision seems somewhat at variance with the current of authority. Until now it has been held, that any one who paid a mortgage on real property, supposing, at the time, that he was the owner of the equity of redemption, which subsequently proved, for any reason, whether of law or fact, not to be the real state of the case, might, at all events, claim to stand in the place of the mortgagee whose incumbrance he had removed from the property under a misapprehension of his relation to it. And what made this case specially aggravating to the plaintiffs was, that, in the language of Mr. Justice FIELD, they had paid the money under a misapprehension, "into which the complainant was led" by the decision of the same court, in *Bronson v. La Crosse & Milwaukee Railroad Co.*, 2 Wal. 283, 304.

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SECTION IIa.

Mortgages and Debentures. — Receivers and Managers.

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| 1. Railway mortgages in this country have been held to entitle the mortgages to foreclose and take the title and possession of the undertaking or works.
2. But in England it has been held that under debentures, of a particular form, nothing passes to the holder but a prior right to payment out of net earnings of the undertaking. | 3. Courts of equity not competent to take permanent charge of the working of a railway.
4. They may take temporary charge in cases of insolvency or conflicting claims.
5. An express charge by the debenture upon the estate of the company binding. |
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§ 235 a. 1. In the case of the debentures of the London, Chatham, and Dover Railway Company, the Lord Justices in the Court of Chancery Appeal made a decision, in the case of Gardner * against that company,¹ defining the precise effect of English railway debentures, which have always hitherto been regarded as mortgages of the property of the company. The debentures in terms pledge "the undertaking" for the repayment of the money borrowed. And that, in effect, is all that is done by any railway mortgage. It mortgages or pledges the undertaking for the repayment of the money. Now upon such a mortgage the question always fairly arises, What is to be regarded as the undertaking thus pledged or mortgaged? It has always been held in this country that this mortgage, when made with legislative authority, and it cannot otherwise be made to any effectual purpose, carries the right of absolutely foreclosing the title to the corporate property and the corporate franchises. In this view, there has always been a serious difficulty in such cases, unless in cases where the legislature provides, either by general or special law, for the creation of a new and distinct corporation, to carry forward the duties of such railway company.

2. But it is now held by the highest of the English courts of chancery that, by a mortgage of the undertaking, nothing more passes than a priority of right to the net earnings of the company; (a) that the undertaking is the combined result of the cor-

¹ Law Rep. 2 Ch. Ap. 201.

(a) In *Myatt v. St. Helens & the "undertaking" and the "rates, Runcorn Gap Railway Co., 2 Q. B. tolls, and other sums arising,"* did not 364, it was held that a mortgage of cover the lands of the company.

porate franchise and all the property rights, and the net avails of such combined property, which is but another name for the net earnings of the company. This decision places railway debentures and mortgages of the undertaking upon much, if not precisely, the same basis as that of preference stocks, which are very commonly issued in England, and not unfrequently in this country.²

² The debentures in this case pledged the "general undertaking of the company" and "all the tolls and sums of money arising upon or out of the said general undertaking" and "all the estate, right, title, and interest of the company in the same." The holders thereof sought payment through the medium of a receiver out of the rents and the proceeds of sales of surplus lands, — lands, i. e., taken by the company in the belief that they would be wanted for the road, or lands which the company was by statute forced to buy in order that the owner might not have a severed part of a tenement or field left on his hands, and the proceeds of which, of whichever sort, the company was by statute bound to apply within a limited time to the purposes of the act. The court held that the debentures gave the holders no specific charge upon the surplus lands so as to entitle them to a receiver of sale money and interim rents, and that the court could not appoint a manager of a railway. Lord Justice CAIRNS, speaking of the appointment of managers, said: "I apprehend that nothing is better settled than that this court does not assume the management of a business or undertaking, except with a view to the winding up and sale of the business or undertaking. The management is an *interim* management; its necessity and its justification spring out of the jurisdiction to liquidate and to sell; the business or undertaking is managed that it may be sold as a going concern, and with the sale the management ends. . . . But in addition to the general principle that the Court of Chancery will not in any case assume the permanent management of any business or undertaking, there is that peculiarity in the management of a railway which would, in my opinion, make it improper * for the Court of Chancery to assume the management of it at all. When parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public and as a road on which the company may themselves become carriers of passengers and goods, it confers powers, and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which parliament has before it, and on no other body or person. These powers must be executed, and these duties discharged by the company. They cannot be delegated or transferred. The company will of course act by its servants, for a corporation cannot act otherwise, but the responsibility will be that of the company. The company could not by agreement hand over the management of the railway to the debenture holders. It is impossible to suppose that the Court of Chancery can make itself or its officers, without any parliamentary authority, the hand to execute these powers; and all the more impossible when it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management. It is said that the railway company did not object to the order

3. It will be seen that the decision covers another important point, that of courts of equity appointing a manager to conduct

for a manager. This may well be so. But in the view I take of the case, the order would be improper, even if made on the express agreement and request of the company."

Concerning the right of the debenture holders to the proceeds and interim rents of the surplus lands, the learned judge further said: "It is obvious from this [duty of the company to sell surplus lands and apply the proceeds to the purposes of the act] that the surplus land is in truth the representative or equivalent of a certain proportion of the capital provided by the company for the execution of their works, which has, not for the purposes of profit, but for the protection of land-owners, been temporarily diverted, and invested in land to be again resold, and which is to return to the capital of the company when the purpose for which it is diverted has been accomplished. And as regards the *interim* rents, if any, of surplus lands, they would appear to be in the same position as the income arising from capital provided by the company and temporarily invested in any other manner until needed. The argument by which the debenture holders maintained their right to a receiver of the proceeds of the surplus lands was in substance this: They say they are mortgagees of the undertaking and of the tolls and sums of money * arising out of it, or by virtue of the act authorizing it; that all the land taken by the company under its parliamentary powers goes in the first instance to form a part of the undertaking; that as soon as any land becomes surplus land, it becomes at the same time subject to the parliamentary provision for its resale, but the sale-moneys are in turn subjected to this trust, that they are to be applied to the purposes of the special act, that is, for the purposes of the undertaking; that these moneys, therefore, become and form a part of the undertaking, and therefore of their security, and ought to be preserved and applied for them by this court. It is necessary to observe carefully to what length this argument must go. A railway is made and maintained by means of its capital, by means of its borrowed money, of its land, of its proceeds of sale of surplus land, of its permanent way, of its rolling stock. All of these may be said in a certain sense to be connected with, to be parts of, to make up the undertaking. If a mortgage of the undertaking carries *in specie* the sale-money of surplus lands, it must equally and on the same principle carry *in specie* the ordinary land of the company, the capital, the permanent way, the rolling stock, — nay, even the very money itself lent on the mortgage. The assignment made by the mortgage debentures is immediate, and is to continue three years at the least. If the debenture holders are right in their argument, they become immediate assignees *in specie* of all the ingredients which I have enumerated as going to make up the undertaking; and they might from the first have asserted their rights as mortgagees by taking and impounding, not merely the proceeds of the surplus lands, but the capital, the cash balances, the rolling stock, and even their own moneys advanced. Now it is beyond question that the great object which parliament has in view, when it grants to a railway company its extraordinary and compulsory powers over private

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the business of a railway company, which has sometimes been done in this country. But we had always supposed the practice

property, is to secure to the public the making and maintaining of a great and complete means of internal communication; and yet, according to the necessary consequences of the plaintiffs' argument, the moment the company borrowed money on debentures, it would depend on the will or caprice of the debenture holder whether the railway was made at all. I may further observe, that in any sense in which the sale-moneys of surplus lands can be considered part of or arising from the undertaking, calls made and paid subsequent to the debentures must be equally a part of or moneys arising from * the undertaking. . . . It is perhaps unnecessary to pursue further the consequence of the plaintiffs' argument. But it must be evident that if that argument be correct very great differences of opinion and of interest might arise among the debenture holders. Some might desire to arrest the continuance of the undertaking, and to obtain repayment out of the capital or other moneys advanced for the works, while others might consider that their most hopeful chance of repayment would be by the expenditure of these moneys, so as to earn tolls and profits, and it would be difficult in such a case to see any common interest among the body of debenture holders, such as to entitle one to maintain a suit in behalf of all. As regards the effect of the word 'undertaking' in these securities, we gain but little information from the definition given in the acts of Parliament. . . . The object and design of parliament in each of these various undertakings was clearly to create a railway which was to be made and maintained, by which tolls and profits were to be earned, which was to be worked and managed by a company, according to certain rules of responsibility, and under a certain responsibility. The whole of this, when in operation, is the work contemplated by the legislature; and it is to this that in my opinion the name of 'undertaking' is to be given. Money is provided for, and various ingredients go to make up the undertaking; but the term 'undertaking' is the proper style, not for the ingredients, but for the completed work; and it is from the completed work that any returns or earnings can arise. It is in this sense that, in my opinion, the undertaking is made the subject of a mortgage. Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete or to be completed; as a going concern, with internal and parliamentary powers of management not to be interfered with; as a fruit-bearing tree, the produce of which is by the contract dedicated to secure and to repay the debt. The living and going concern thus created by the legislature, must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and other sums of money *ejusdem generis*, — that is to say, the earnings of the undertaking, — must be made available to satisfy the mortgage; but in my opinion the mortgagees cannot, under their mortgage, or as mortgagees, by seizing or calling on this court to seize the capital or the lands, or the proceeds of sales of the

to be a very questionable one. For it amounts to nothing less than the court undertaking to execute the business of operating the road. To this there are very serious, not to say insuperable, objections. In the first place, the legislature has provided that this duty shall be performed by the company, and therefore the public as well as individuals have a right to insist that the company alone shall undertake such duty, and be held responsible in the ordinary mode for any failure in the performance of that duty. And notwithstanding the large confidence universally reposed in the courts of justice, and nowhere more than in the United States, nevertheless unless this confidence amounts to a belief in the absolute infallibility of the courts and of all courts, whether supreme or inferior, one would not desire to have his rights of redress limited to the decision of the particular tribunal into whose hands the management of the railway might happen to fall. For most of the American courts of equity, or those possessing equity powers, are not the highest judicial tribunals of the state. And there would be no right of appeal from the order of the court of chancery directing the management of the railway, or the particular redress which might be awarded to one who might happen to suffer by its mismanagement, — such orders being in their nature mere matters of discretion, and therefore not revisable in any other tribunal ; whereas in cases of actions against railway companies for misconduct or mismanagement, the party injured is entitled to take the opinion of the court of last resort.

4. We know that in cases where a joint-stock company becomes insolvent, it is every day's practice for courts of equity to assume the control of the enterprise, and through the agency of a receiver to conduct for a time the business. This will also happen sometimes * where two or more parties claim the net earnings of the company, either in succession or in conflict. But what is here decided is, that a court of equity cannot assume to take upon itself, through the instrumentality of its officers, to operate a railway permanently, or at least that it cannot do this without the authority of a legislative act.

5. In a winding-up case³ the Master of the Rolls held, that a lands, or the stock of the undertaking, either prevent its completion or reduce it into its original elements when it has been completed. *Gardner v. London, Chatham, & Dover Railway Co.*, 15 W. R. 325.

³ *In re New Clydach Sheet & Bar Iron Co.*, Law Rep. 6 Eq. 514.

debenture purporting to assign the undertaking and all the real and personal estate of the company, to secure the repayment of a sum of money at a future day, created a valid charge on all personal estate of the company existing at the date of the debenture, but not on the subsequently acquired personal estate. His lordship considered that an express charge upon future-acquired estate would differ from the present case.⁴

* SECTION III.

Defences allowed the Company, in regard to borrowed Capital.

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| <ol style="list-style-type: none"> 1. Where the transaction is illegal estoppel will not preclude defence. 2. Company may not contract beyond present powers, on future contingency of obtaining enlarged powers. 3. Company in defence to an action on securities cannot allege its own fraud in issuing to wrong person. 4. Debentures issued without authority cannot be enforced by shareholders aware of the irregularity, nor by their <i>bona fide</i> transferees. | <ol style="list-style-type: none"> 5. But where the money has been applied to the use of the company, or the shareholders have recognized the debt, it must be repaid. 6. Where debenture holders are to be equally entitled, one can have no preference under an additional mortgage. 7. Debenture holders preferred to subsequent judgment creditors. 8. Transfer of debentures through forgery invalid. |
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§ 236. 1. It is obvious that securities for capital borrowed by railway and other companies of that description, with large capital, and intended in some sense to serve the purposes of safe investment, must be made strictly within the powers of the company and for the purposes of its creation. And where it is the purpose of those making the advance of capital to such company, as well as of the company, to perpetrate a direct violation of the charter, or any other specific illegality, to the detriment of the shareholders or the public, it will afford a sufficient defence to the company itself, upon the most familiar general principles applicable to the subject. And even an estoppel, by deed or of record, will not enable the creditor so to conclude the company, who stand in some sense in a fiduciary relation as *quasi* trustees for the shareholders

⁴ *In re Marine Mansions Co.*, Law Rep. 4 Eq. 601.

and the public, as to escape the real question involved in the transaction.¹ (a)

¹ *Hill v. Manchester & Salford Water Works*, 2 B. & Ad. 544. But unless some fraud is alleged to have been attempted to be perpetrated on the shareholders, the estoppel will be enforced. See also *Doe v. Ford*, 3 A. & E. 649.

But the mortgagor is estopped from setting up a prior mortgage to defeat the present action. *Doe v. Penfold*, 3 Q. B. 757. As to where time is of the essence of contracts, for the conversion of one security into others, see *Campbell v. London & Brighton Railway Co.*, 5 Hare, 519. And the converse of this rule was applied in the case of *Madison, Watertown, & Milwaukee Plank-Road Co. v. Watertown & Portland Plank-Road Co.* Here the plaintiff corporation, which was created for the purpose of building a plank-road, guaranteed the payment of a loan of money made to the defendant corporation, for the purpose of enabling it to build its road, the completion of which would be advantageous to the former; and on default of payment of this loan, the plaintiff paid the amount thereof; and it was held that this guaranty being unauthorized, the payment created no liability on the part of the defendant, for whose benefit it had been made. The guaranty and payment having been made by the plaintiff, the defendant was held not to be estopped from setting up the want of power to make the contract of guaranty. *Madison, Watertown, & Milwaukee Plank-Road Co. v. Watertown & Portland Plank-Road Co.*, 7 Wis. 59.

The Madisonville & Franklin Railway Co. issued certain bonds, and made them payable to the order of the Madison & Indianapolis Railway Co., for the purpose of completing the road of the former company. The bonds were delivered to the Madison Company, and were indorsed and guaranteed by that company, and sent to its agent in New York for sale. The agent, in his circular offering them for sale, represented that they were owned by the Madison & Indianapolis Company. Suit being brought against the company on its guaranty, it was held that it was within the scope of the corporate powers of the Madison & Indianapolis Company to sell and guarantee bonds held by it in the regular course of its business; and that, as the contract of guaranty was on its face such a contract as the company had power to make, the fact that the contract in this case was made for a purpose not authorized by its charter, as for the accommodation of another company, could not affect the right of a *bona fide* holder without notice to recover on it. *Madison & Indianapolis Railroad Co. v. Norwich Savings Society*, 24 Ind. 457. And see *Connecticut Mutual Life Insurance Co. v. Cleveland, Columbus, & Cincinnati Railroad Co.*, 41 Barb. 9, where the subject is discussed and like views are maintained. *Olcott v. Tioga Railroad Co.*, 40 Barb. 177. And where the secretary of a railway company offered bonds of the company to the plaintiff, who accepted and paid for them, and it proved, ultimately, that the company had no legal power to issue them, it was held that the plaintiff could not, after the company had ceased to pay interest on them, maintain a bill against the directors to compel

(a) See *infra*, pl. 3 and notes. ral persons. *Little Rock & Napoleon Railroad Co. v. Little Rock, Mississippi, & Texas Railroad Co.*, 36 Ark. 663.

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* 2. Where the company agreed to sell shares to a party, on condition that as soon as they were paid in full they would give debentures in exchange for the shares, if they should then be in a condition legally to do so, the contract was held to be illegal, and a decree of specific performance was refused, on the ground that the company were not at the time authorized to raise money in that mode.² But where the trustees, under turnpike acts, having power to borrow money on mortgage of the tolls and toll-houses of the company, executed such a mortgage to their clerk, to whom they were indebted for costs, and recited in the deed that it was given for moneys advanced, it was held valid.³

3. But the company cannot set up, in defence of a security * properly executed by them, that it was, through fraud between other parties and among themselves, not executed and delivered to the party really entitled to receive it.⁴ (b)

4. Debentures of a business corporation issued by the directors without due authority, although under the seal of the company, cannot be enforced by members of the company who accepted them after being present at the meeting where the irregular issue of such debentures was sanctioned. And a *bona fide* transferee of such debentures from such shareholders will stand in no better position. Nor can strangers or their assignees enforce them, where they were accepted by the first holders with knowledge that the condition on which they were issued had not been fulfilled.⁵

5. But where the money advanced on such irregular securities had been applied by the directors for the benefit of the company, and the shareholders have acquiesced in the transaction, the company and the shareholders are precluded from disputing their liability to repay the advance. (c) And where a payment of six them to pay him the amount, the bill not alleging either fraud or misrepresentation. *Rashdall v. Ford*, Law Rep. 2 Eq. 750.

² *West Cornwall Railway Co. v. Mowatt*, 17 Law J. Ch. 366.

³ *Doe v. Jones*, 5 Exch. 16.

⁴ *Horton v. Westminster Improvement Commissioners*, 7 Exch. 780; s. c. 14 Eng. L. & Eq. 378.

⁵ *In re Magdalena Steam Navigation Co.*, 1 Johns. Ch. Eng. 690; s. c. 6 Jur. n. s. 975.

(b) See *supra*, pl. 1, and notes.

(c) See *Singer v. St. Louis, Kansas City, & Northern Railroad Co.*, 6 Mo. Ap. 427; *Tyrell v. Cairo & St. Louis Railroad Co.*, 7 Mo. Ap. 291; *Harrison v. Annapolis & Elk Ridge Railroad Co.*, 50 Md. 490; *Thomas v. Citizens' Horse Railway Co.*, 104 Ill. 462.

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per cent interest had been made upon the debentures without objection, it was held that although the holders could not recover upon the debentures, they were entitled to six per cent interest on the advances.⁶

* 6. These debenture holders, by the act of parliament, were to be entitled *pari passu*. One who had obtained an additional mortgage was held entitled to no advantage on that account.⁶

7. As between debenture holders and subsequent judgment creditors, the former are entitled to priority of lien upon money paid into court as the avails of the sale of the property of the company.⁷

8. Where railway debentures had been transferred by means of a forged indorsement of the names of two of the joint holders, by the third, who having the custody of them made the transfer by deed, the purchaser acting *bona fide* and paying full value, the transfer was set aside after the purchaser had been admitted on the books of the company as the owner of the debentures, and the entry on the books of the company ordered to be cancelled.⁸

⁶ *De Winton v. Brecon*, 26 Beav. 533; *infra*, § 239. The question of the effect of an over-issue of debentures by the directors, and also the re-issue of the same, without the authority of a general meeting of the stockholders, as is required by the English statute in such cases, is considerably discussed by the late Lord Chancellor HATHERLEY, then Vice-Chancellor WOOD, in *Fountaine v. Carmarthen Railway Co.*, 5 Eq. Cas. 316. It was the rather reluctant and hesitating conclusion of his lordship, that the debentures, which were confessedly an over-issue, must be regarded as *ultra vires*, and so not binding on the company; although there was not, as his lordship intimated there should have been, any declaration, on the face of the debenture, how much had been issued in all, and no ready mode of testing the fact by the purchaser, whether the debentures were, or not, in fact an over-issue. As to the re-issue of debentures, without the prescribed formality of the consent of a general meeting, his lordship adopted the somewhat new construction, that this, being intended for the protection of the shareholders against the misconduct of their directors, was to be regarded as a matter wholly between those parties, and so merely directory, and not affecting the authority of the directors, so far as dealings with third parties were concerned. The most effective security to the shareholders must unquestionably be the holding the unauthorized acts of the directors inoperative, as to third persons even. But the rule seems to be otherwise in England. *Supra*, § 139.

⁷ *Furness v. Caterham Railway Co.*, 27 Beav. 358.

⁸ *Cottam v. Eastern Counties Railway Co.*, 1 Johns. & H. 243; s. c. 6 Jur. n. s. 1367.

SECTION IV.

Right to issue preferred Stock. — Converting Loan into Capital.

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| 1. Company may issue new stock, and give it preference as a <i>bona fide</i> means of borrowing money.
2. Under English statutes, loan convertible into capital. Terms of statute must be strictly pursued. Equity cannot dispense with them.
3. Debenture holder in England not entitled to foreclosure. | 4. Right of company to issue stock certificates bearing interest. Such interest cannot be paid in bonds of the company. Ratification of such issue.
5. Guaranteed stock not enforced against the corporation except by the courts of the state, nor unless the corporation has means to pay according to the guaranty. |
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§ 237. 1. The company, where the capital is not limited in the charter, may from time to time issue new shares, and probably give them a preference, as a mode of borrowing money, where they have the power to borrow on bond and mortgage, as preferred stock is only a form of mortgage.¹ But without the power to mortgage expressly given, the right of the majority to issue preferred * shares, a majority of which they would themselves be entitled to hold, might be more questionable.²

¹ *Bates v. Androscoggin & Kennebec Railway Co.*, 49 Me. 491, where the question of the rights of holders of preferred stock is fully discussed. There is nothing against law or public policy, say the court in *Evansville & Crawfordville Railroad Co. v. Evansville*, 15 Ind. 395, in the agreement of a railway company to allow interest on stock subscribed. But the holders of preferred stock are only entitled to dividends out of profits *bona fide* earned by the company. *Taft v. Hartford, Providence, & Fishkill Railroad Co.*, 8 R. I. 310.

² Where, under its articles of association, a company was empowered, at a special meeting, to increase the capital stock of the company by the issue of new shares, to be of such nominal value and subject to such conditions in regard to the payment of calls and distribution of profits as might be determined, it was held that this did not authorize the issue of preference shares. *Moss v. Syers*, 32 Law J. N. S. Ch. 711.

In *Hutton v. Scarborough Cliff Hotel Co.*, 2 Drewry & S. 514, it was held, that the court, at the suit of dissenting shareholders, will restrain the issue of preference shares in accordance with a resolution passed at a general meeting of the company.

2. By the English statutes, loan may, on certain conditions, be converted into capital; (a) but those interested must strictly pursue the terms prescribed for accomplishing such change, and time is regarded as of the essence of the right to claim such conversion.³ And it is no sufficient reason to claim a dispensation at the hands of a court of equity, that one of the shareholders was out of the country, and had no notice of the vote of the company till after the time limited in the same for application to convert loan into shares had expired.⁴

3. It has been held that under the English railway acts the holder of debentures, which is, as we have seen, a kind of mortgage bond, is not entitled to a foreclosure or a sale of the works of the company, or of the thing pledged for the repayment of the money; but inquiries were directed.⁵

4. It seems questionable how far railway corporations without special authority of the legislature have power to issue stock certificates bearing interest. Such action seems like an attempt to

³ *Hodges Railw.* 160, 161, 162; *Campbell v. London & Brighton Railway Co.*, 5 Hare, 519.

⁴ *Parsons v. London & Croydon Railway Co.*, 14 Sim. 541. And where, by the terms of a railway bond, a period was fixed within which it might be converted into stock at the option of the holder, it was held, that an agreement for the extension of the bond after the time appointed for payment did not extend also the right to conversion into stock. *Muhlenburg v. Philadelphia & Reading Railroad Co.*, 47 Penn. St. 16.

But where preferred stock was allowed to be issued, with a statute provision that the whole of the interest or dividend of each year should be applied, in the first place, to payment of interest or dividend at the rate of six per cent per annum on the preferred stock, and only the remainder, if any, should go to the holders of the other stock, it was held that the holders of the preferred stock were to receive six per cent in full on their shares before any payment was made to the holders of other stock, and that all arrears due to the preferred shareholders must be made up before the others could receive any dividends. *Matthews v. Great Northern Railway Co.*, 5 Jur. n. s. 284; *Corry v. Londonderry & Enniskillen Railway Co.*, 29 Beav. 263; s. c. 7 Jur. n. s. 508.

⁵ *Furness v. Caterham Railway Co.*, 25 Beav. 614; s. c. 4 Jur. n. s. 1213.

(a) And so it may, it seems, in this country, in some cases. But where bonds are indorsed "convertible into the capital stock of the company at the pleasure of the holder," the right of conversion goes with the bonds and cannot be separately assigned. *Denney v. Cleveland & Pittsburg Railroad Co.*, 28 Ohio St. 108. And see *Sutliff v. Cleveland & Mahoning Railroad Co.*, 24 Ohio St. 147.

convert a certificate of stock into a security for a loan, either permanently or temporarily. But if this may be lawfully done, the company cannot compel the holder to accept payment of such interest in the bonds of the company, but such a vote may operate as an implied ratification of the act of the officers of the company in issuing the certificate.⁶

* 5. The Chancery Court of another state from that where a railway corporation exists cannot afford any remedy against the company * for not declaring or paying the stipulated dividend upon preferred or guaranteed stock, nor can the holder of such stock maintain an * action at law against the corporation for not paying such stipulated dividend, the same having never been declared by the directors.⁷ This was a case where the certificate in terms guarantied the payment of a dividend of *ten per cent*

⁶ *McLaughlin v. Dayton & Michigan Railroad Co.*, 8 Mich. 100. An important question has been determined in the Court of Chancery in Maryland, in regard to priority of lien, as between mere certificates, called "income bonds," issued by a railway company, pledging the income of the road for the payment of interest and the ultimate redemption of principal, and a subsequent formal mortgage of the road and its appurtenances. These certificates purported on their face to be secured by a "specific pledge of the income of the road;" and were sold, under the express assurance from the directors and agents of the road that no subsequent mortgage of the road would be executed till the final redemption of these bonds. The bill was brought by certain holders of these bonds, on behalf of themselves and all others standing in the same relation who might choose to come in under the bill, thus being in the nature of a creditor's bill. It was brought against the company and the agents who effected the sales of the bonds in the market and made the representations on which the purchases were made, for the purpose of establishing the prior equitable lien of the income bonds over the subsequent formal mortgage. This decision was reversed upon the proofs merely. *Garrett v. May*, 19 Md. 177.

⁷ *Williston v. Michigan Southern & Northern Indiana Railroad Co.*, 13 Allen, 400. But where the corporation issues certificates payable at a day named, with the condition that if at that time there should not be money sufficient in the treasury to pay the whole amount, the holders shall receive their proportion of the same, the holder cannot maintain an action without proving that the company, either at the time specified for payment, or at least before the suit brought, possessed the money for paying the full amount. But the question of ability to pay is not to be decided by the directors of the company, but by the court, having regard to the existing liabilities and funds of the corporation, and any contingencies to which they may be exposed demanding increased outlay. *Barnard v. Vermont & Massachusetts Railroad Co.*, 7 Allen, 512.

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annually, and a *pro rata* share in any surplus; and the counsel claimed a distinction between preferred and guaranteed stock. There is, unquestionably, a difference in form, but probably no essential difference in the legal effect of the two. They both contain a virtual stipulation of the corporation that the requisite dividend shall be declared out of the first surplus earnings of the company. And to this extent the duty may be enforceable by a court of equity in the same state, or by writ of mandamus. But if there be a deficiency of the earnings to warrant the dividend, no court can supply the defect.

SECTION V.

Investment of Trust Funds in Railway Securities.

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| <p>1. General duty of trustees in making investments.</p> <p>2. English courts have regarded railway</p> | <p>securities too uncertain for such purpose.</p> <p>3. So regarded in a case in New Hampshire.</p> |
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§ 238. 1. A trustee is ordinarily excused where he exercises his best judgment, and the fund is lost or diminished by what appears *to be a mere casualty. But he is always *prima facie* liable for any such loss, and ultimately, unless he can show very clearly that he was not in fault. By this is understood, commonly, that he invested and managed the fund as a prudent man would do with his own. And as the purpose of such funds ordinarily is to raise an annuity, it must be invested in some mode; and the most that human foresight can accomplish is, to make a wise selection of the different opportunities which offer.¹

2. But where, by the terms of a settlement, the trustees had authority to invest in the public stocks, or real securities, it was held a breach of trust to invest the trust fund in railway debentures, not so much because this might not be fairly regarded as a

¹ 2 Story Eq. Jur. §§ 1269, 1271; *Clough v. Bond*, 3 Myl. & C. 490, 496. But it is said, if the trustee mix the fund with his own money or invest it in an improper stock, he is liable. 2 Story Eq. Jur. §§ 1270, 1271; *Massey v. Banner*, 4 Mad. Ch. 413; *Thompson v. Brown*, 4 Johns. Ch. 619; *Knight v. Plymouth*, 3 Atk. 480; *Powell v. Evans*, 5 Ves. 839.

real security, as on account of the uncertain character of the security.² (a)

3. In a recent case³ in New Hampshire, this subject is discussed at length and the following results arrived at by a judge of extensive learning and experience, Chief Justice Woods: 1. Where money is bequeathed to a trustee, "to be invested and improved according to his best skill and judgment," it is his duty to invest it in safe securities, and his discretion, in the selection of investments, is not enlarged by the words "according to his best skill and judgment." 2. If a trustee's authority enables him to invest in stocks,* they should appear to have been at the time productive, and to have had a market value, depending upon their income, and not upon contingencies. 3. Shares in a contemplated railway are not such.

² *Mant v. Leith*, 15 Beav. 524; s. c. 10 Eng L. & Eq. 123. In the case of *Ellis v. Eden*, 25 Beav. 482; s. c. 30 Law T. 601, where one devised to trustees certain securities for the payment of legacies, and directed it to be reduced to cash, excepting, among other things, such as consisted of "stock in the foreign funds," it was held that this term included the American state stocks of Virginia, Massachusetts, &c., but did not include Boston water scrip, or bonds of the Pennsylvania Railway. But bonds issued under special legislative authority by a state or city, for the purpose of aiding in the construction of a railway, are public stocks, and taxable, as such, under the Massachusetts statutes. *Hall v. County Commissioners*, 10 Allen, 100.

* *Kimball v. Riding*, 11 Fost. N. H. 352.

(a) The matter of the securities in which trust funds shall be invested is one respecting which the courts of each state may be said to have their own rule, where the rule has not been set by statute, as it has been in several states.

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SECTION VI.

Bona Fide Holder of Railway Bonds, with Coupons, may enforce them.

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| <ol style="list-style-type: none"> 1. In this country railway coupon bonds payable to bearer are negotiable securities. 2. Coupons stand upon the same footing. 3. Same rule extended to municipal bonds. 4. Railway bonds issued in blank may be filled up with name of last holder. 5. In England, otherwise, if money be not obtained for a purpose within the scope of the business of the company and the power of the directors. 6. Sometimes held that no action will lie on the coupons. | <ol style="list-style-type: none"> 7. In England <i>bona fide</i> purchaser held to take subject to all equities. 8. Where third parties have become affected by the entry upon the books of the company. 9. Where company is allowed to mortgage, but prohibited from issuing bills of exchange, a mortgage given to secure a debt evidenced by bills of exchange, held good. 10. Lands mortgaged without authority equally divided among all the creditors standing in the same right. |
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§ 239. 1. In a case in New Jersey,¹ it was decided by the Court of Appeals, that bonds with coupons payable to bearer, issued by the plaintiffs, passed by delivery from hand to hand the same as bank-notes, and that a *bona fide* purchaser for value, without notice of any prior defect in the title from the company, might enforce them, independent of all equities between the company and the first holder. This decision is approved in the case of *Mechanics' Bank v. New York & New Haven Railway*.² The

¹ *Morris Canal & Banking Company v. Fisher*, 1 Stock. 667. Professor Parsons, 1 Parsons Cont. 240, says: "It may, however, be here said, that we regard the English authorities as making all instruments negotiable which are payable to bearer, and which are also customarily transferable by delivery, within which definition we suppose the common bonds of railroad companies would fall." The same principle is laid down in *Eaton & Hamilton Railroad Co. v. Hunt*, 20 Ind. 457; *Connecticut Mutual Life Insurance Co. v. Cleveland, Columbus, & Cincinnati Railroad Co.*, 41 Barb. 9; *Maddox v. Graham*, 2 Met. Ky. 56; *Commonwealth v. Perkins*, 43 Penn. St. 400.

² 13 N. Y. 599. And in the case of *Brainerd v. New York & Harlem Railroad Co.*, 25 N. Y. 496, it was held that the bond of a railway corporation payable to A. B. "or his assigns," was in the nature of commercial paper, negotiable by delivery under an assignment in blank, and not a specialty, subject to equities between the corporation and the person named in the bond as the primary payee.

* same principle has been extended to certificates of deposit,³ and to state bonds.⁴ The English courts have adopted the same rule in regard to bonds of the King of Prussia;⁵ to Exchequer bills,⁶ and bonds of the government of Naples when put in a condition to be negotiable in that country.⁷

2. We think there can be no reasonable doubt of the soundness of the principle as applied to railway bonds, made payable to bearer, with coupons attached for the payment of interest. And we are confident this is the view taken of this question generally by commercial men and companies, both as to the bonds and the coupons.⁸ (a)

³ *Stoney v. American Life Insurance Co.*, 11 Paige, 634.

⁴ *Delafield v. Illinois*, 2 Hill, 159.

⁵ *Gorgier v. Mieville*, 3 B. & C. 45.

⁶ *Wookey v. Pole*, 4 B. & Ald. 1.

⁷ *Laue v. Smyth*, 7 Bing. 284.

⁸ *Carr v. LeFevre*, 27 Penn. St. 413, where the court held that such bonds might be sued in the name of the holder, and that possession was *prima facie* evidence of ownership. And where a suit is brought for the collection of the interest due on such bonds, evidenced by coupons, the court will not allow the payee of the bond to take judgment for the interest due, until the coupons are produced. *Williamson v. New Albany & Salem Railroad Co.*, 2 Redf. Am. Railw. Cas. 682; *Morris Canal & Banking Co. v. Lewis*, 12 N. J. Eq. 323, where it was held that coupon bonds of an incorporated company

(a) Thus it has been held that a *bona fide* holder may collect the full amount of the bonds, whatever they cost him, and though wrongfully put in circulation. *Grand Rapids & Indiana Railroad Co. v. Sanders*, 17 Hun, 552.

A bond, however, in terms payable at a certain time, but containing a clause reserving to the makers "the right to pay the same at any time to be named by them," adding a certain per cent to the principal, is non-negotiable for uncertainty as to the time of payment. *Chouteau v. Allen*, 70 Mo. 290. And a bond to bear interest at a certain rate if payable in one place and interest at a certain greater rate if payable in another, the place

of payment to be selected by the president of the corporation, is non-negotiable for uncertainty as to the amount. *Jackson v. Vicksburg Railroad Co.*, 2 Woods, 141. And it has been held that a want of consideration will be a defence as against a *bona fide* purchaser. *Chicago, Danville, & Vincennes Railroad Co. v. Loewenthal*, 93 Ill. 433.

With respect to negotiability, detached coupons in general, being for a sum certain, and payable to bearer at a specified time and place, stand upon the same footing with bonds and pass from hand to hand by delivery. *North Bennington First National Bank v. Mount Tabor*, 52 Vt. 87; *Ketchum v. Duncan*, 96 U. S. 659.

*3. And in a case in the state of Mississippi,⁹ the question was considered by their court of errors, in regard to the bonds are transferable by delivery only. And see *Brookman v. Metcalf*, 32 N. Y. 591.

But in *Jackson v. York & Cumberland Railroad Co.*, 48 Me. 147, the

* *Craig v. Vicksburg*, 31 Miss. 216. But it is said that a decision was made in Alabama many years since by a divided court, against the rule here adopted, but that it has been overruled.

The case of *Zabriskie v. Cleveland, Columbus, & Cincinnati Railroad Co.*, 10 Am. Railway T. No. 15, is justly regarded as an important one. The opinion of Mr. Justice McLEAN discusses many points incidentally connected with the subject. But the decision seems to be placed mainly on the ground, that the bonds having gone into the market, in the form of negotiable securities payable to bearer, and the company having at a meeting (although defectively called) ratified the issue, and this being known, for more than two years, to the agent of the complainant residing abroad, before any movement was made by any party to enjoin them, the acquiescence was such as to conclude the plaintiff, who sued for an injunction as a stockholder, on the ground that the indorsement and payment of these bonds by the defendants would tend to diminish their profits. This ground seems to us entirely satisfactory. It is questionable, whether the guaranty of the bonds by defendant is not, under the statutes in force in Ohio allowing railway companies to aid in the construction of other connecting railways, "by subscription to their capital stock or otherwise," *prima facie* to be regarded as a legitimate commercial contract; and if so, whether it is not such an act as is calculated to put the purchaser on his guard, and thereby affect him with constructive notice of any latent infirmity in the prior proceedings of the company in making the guaranty. This is the pervading view maintained in the opinion.

But it is here conceded, that, if the charter of the company or the general laws prohibit such a contract being entered into by such a corporation, the contract, although made in the form of a negotiable security, is void in the hands of a *bona fide* holder for value. *Root v. Goddard*, 8 McLean, 102; *Root v. Wallace*, 4 McLean, 8. And it seems to be conceded, as a general rule, that in regard to the requisite formalities, either of the charter or the general laws of the state, one who takes negotiable securities in the market in the due course of business is not obliged to make inquiries beyond the point of the capacity of the parties to contract in the particular form presented on the face of the paper.

And where the records of the company show the requisite formalities to have been complied with, this, as between the company and third parties, will be held conclusive against them. And this case was affirmed in the Supreme Court of the United States. *Zabriskie v. Cleveland, Columbus, & Cincinnati Railroad Co.*, 23 How. 381; *supra*, § 239.

And see *Madison, Watertown, & Milwaukee Plank-Road Co. v. Watertown & Portland Plank-Road Co.*, 7 Wis. 59; *Madison & Indianapolis Railroad Co. v. Norwich Savings Society*, 24 Ind. 457.

issued by the city of Vicksburg, and the conclusion arrived * at, that such bonds, payable to bearer, pass from hand to hand by

court say that no action can be maintained in the name of the assignee of such coupons, where they contain no negotiable words, nor language from which it can be inferred that it was the design of the corporation issuing them to treat them as negotiable paper, or as creating an obligation distinct from and independent of the bonds to which they were severally attached when issued; that proof of custom, as to the negotiability of such coupons, is inadmissible. See *Augusta Bank v. Augusta*, 49 Me. 507. This rule is contrary to the great majority of the cases. See *Beaver County v. Armstrong*, 44 Penn. St. 63; *White v. Vermont & Massachusetts Railroad Co.*, 21 How. 575; *Chapin v. Vermont & Massachusetts Railroad Co.*, 8 Gray, 575; *McElrath v. Pittsburg Railroad Co.*, 55 Penn. St. 189. In the *Blakely Ordnance Co.*, Law Rep. 3 Ch. Ap. 154, the general question of the negotiability of debentures under the seal of a joint-stock corporation is somewhat discussed by the late Lord Justice ROLT, a very able and learned judge. His lordship comes to the conclusion that such contracts do create a *prima facie* debt against the company, but not of a negotiable character, nor a debt upon which the *bona fide* holder could maintain an action at law in his own name. But being the debt of the company, the *bona fide* holder was allowed to prove the same, as a claim before the official liquidator, in the winding-up proceedings of an insolvent company. And on the authority of *In re Agra & Masterman's Bank*, Law Rep. 2 Ch. Ap. 391, it was held, that such securities, in the hands of a *bona fide* holder, will exclude all equitable defences on the part of the company against the original holder. This seems, virtually, although not precisely in form, to recognize these debentures as negotiable securities, and it is but another instance of the extreme difficulty of maintaining any position in conflict with the established commercial usages of the country. But in *In re Natal Investment Company*, Law Rep. 3 Ch. Ap. 355, Lord CAIRNS, Lord Justice, a very high authority, held that in order to exclude the equities existing between the original parties, in the hands of a *bona fide* holder of such debenture, it must appear very clearly, that such was the intention of the parties to the original contract. See also *Aberaman Iron Works v. Wickens*, Law Rep. 5 Eq. Cas. 485, 517. Where bonds issued by a municipality in aid of a railway were declared by a statute to be negotiable, and were made payable to the company, "its assignee or bearer," it was held, that they were good in the hands of an innocent holder, though they might not be valid between the original parties. *Maddox v. Graham*, 2 Met. Ky. 56. Where bonds were allowed to be issued after certain notice, it was held that the issue imported compliance with all prerequisites to such issue, and that the purchaser was not bound to any further investigation. *Pearce v. Madison Railroad Co.*, 21 How. 442. And in *Junction Railroad Co. v. Cleneay*, 13 Ind. 161, it was held that suit could be maintained on coupons without the production of the bonds to which they had been attached. And see *Brainerd v. New York & Harlem Railroad Co.*, 25 N. Y. 496; *Connecticut Mutual Life Insurance Co. v. Cleveland, Columbus, & Cincinnati Railroad Co.*, 41 Barb. 9.

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delivery like bank-notes, and that the holder's title depends upon the fact of his being the bearer *bona fide*, and that, as such, he may recover of the maker without giving further proof of title.¹⁰ And the maker can only defend an action so brought by the bearer by proving that the holder had knowledge of the defence at the time, or before he received the bond.¹¹

4. In a case, in the United States Supreme Court,¹² this subject was examined, and the authorities, both in this country and in England, extensively reviewed, and the conclusion reached, that railway bonds issued in blank, no payee being named, but delivered to a citizen of Massachusetts for value, and having passed * through many hands, might be filled up payable to the last holder for value, and a suit maintained in his name in the circuit courts of the United States. It is there said by Mr. Justice NELSON, in giving judgment, that "the usage and practice of railway companies and of the capitalists and business men of the country, and decisions of courts, have made this class of securities negotiable instruments." The late English cases, wherein it was held that instruments issued in blank were void, were considered and overruled¹³ by the court in the case last cited.

5. But the English Court of Common Pleas held, in a recent case,¹⁴ that a bill of exchange drawn on behalf of a joint-stock company, in the form prescribed by statute, does not bind the company, even in the hands of a *bona fide* holder, if the bill be drawn for any purpose not within the scope of the business of the company or the power of the directors.¹⁴

6. And it has been held, contrary to the general opinion, that no action will lie upon the interest warrants or coupons, independent of the bonds upon which the interest accrued, but that the action must be upon the bonds.¹⁵ (b)

¹⁰ And coupons on such bonds cannot be attached on trustee process. *Smith v. Kennebec & Portland Railroad Co.*, 45 Me. 547.

¹¹ *Morris Canal & Banking Co. v. Lewis*, 12 N. J. Eq. 323.

¹² *White v. Vermont & Massachusetts Railroad Co.*, 21 How. 575. See also *Chapin v. Same*, 8 Gray, 575.

¹³ See *supra*, § 35.

¹⁴ *Balfour v. Ernest*, 5 C. B. N. s. 601; s. c. 5 Jur. N. s. 439.

¹⁵ *Crosby v. New London, Willimantic, & Palmer Railroad Co.*, 26 Conn. 121. See also *Shoemaker v. Goshen*, 14 Ohio St. 569. But these coupons

(b) See *supra*, note (a).

7. And where the debentures or mortgage securities of a railway company had been issued by the company to a party under a contract which amounted to a fraud upon the shareholders, and they were transferred by such party in the market to *bona fide* purchasers, it was held that such purchasers took the securities subject to all equities existing between the prior parties.¹⁶

And where it appeared that the purchasers had procured the entry of a transfer of the debentures to them to be made in the books of the company, and had also received from the company interest or dividends upon the debentures, such entry and dividends not having been communicated to the shareholders, it was held that they were not bound thereby, and that the debentures could not be enforced against the company.¹⁶

* 8. It might perhaps merit a different consideration, where, the transfer of the debentures being entered upon the books of the company, third parties had become *bona fide* purchasers in faith of the title being where it appeared to be upon the books of the company.¹⁷ But it is said in the former case,¹⁶ that it is the duty of the purchaser to ascertain whether they are tainted with fraud or irregularity, and that the facts of the company registering the transfers and paying dividends without objection are no conclusive estoppel against their disputing the binding force of the debentures, until they are shown to have been ratified by the shareholders.

9. Where the directors of a company were prohibited issuing bills of exchange, but had power to borrow money on mortgage, they gave bills to secure an existing debt, and executed a mortgage at the same time, subject to redemption upon payment of the bill: held, upon a bill for foreclosure, that the mortgage was given to secure the debt, and not the bills merely, and that upon a bill of foreclosure the debt of the company must be treated as valid until set aside by an independent proceeding.¹⁸

have been repeatedly recognized as valid evidence of the indebtedness of the corporation, and as drawing interest after due, where payment had been unjustly neglected or refused. *Aurora City v. West*, 7 Wal. 82; *Miller v. Rutland & Washington Railroad Co.*, 40 Vt. 399.

¹⁶ *Athenæum Life Insurance Co. v. Pooley*, 3 De G. & J. 294; s. c. 5 Jur. n. s. 120; *supra*, § 234, note 10. But see *In re Imperial Land Co.*, 19 W. R. 223, and cases there cited; s. c. Law Rep. 6 Ch. Ap. 96.

¹⁷ *Fisher v. Essex Bank*, 5 Gray, 373; *Sabin v. Woodstock Bank*, 21 Vt. 362.

¹⁸ *Scott v. Colburn*, 26 Beav. 276; s. c. 5 Jur. n. s. 183.

10. And where the company mortgage lands to secure their indebtedness, contrary to the provisions of the powers granted them, any other creditor standing in the same right with the mortgagee may maintain a bill in equity to compel the equal distribution of the mortgaged estate among all the creditors standing in the same right.¹⁹

¹⁹ *De Winton v. Brecon*, 26 Beav. 533; s. c. 5 Jur. N. S. 882.

*CHAPTER XXXIV.

DIVIDENDS.

SECTION I

When Dividends are declared, and how payable.

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| 1. Dividends should be declared only from net earnings of the company.
2. Right of shareholders to dividends declared is several, but to profits not yet divided, joint. | 3. Lien on shares creates a lien on dividends.
4. Surety on bank note or bill may restrain transfer of principal's stock.
5. Action will not lie against company for dividends before demand. |
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§ 240. 1. DIVIDENDS are only to be declared out of the actual earnings of the company; and if they be declared when not earned, and so virtually payable out of the capital, or, which is the same thing, out of money borrowed, and this be done for the purpose of increasing the price of shares or the credit of the company (and it is difficult to conjecture any other motive, unless done under a misapprehension of the true state of the company's finances), it is a fraud upon the shareholders, and upon the public also, and any one injured thereby, as we have before seen, is entitled to relief either in equity or at law.¹ (a)

¹ See *supra*, §§ 41, 211. But a court of equity will not restrain the company from paying a dividend on the ground merely that the directors have acted in violation of their duty to the public. *Brown v. Monmouthshire Railway & Canal Co.*, 13 Beav. 32; s. c. 4 Eng. L. & Eq. 113; *Stevens v. South Devon Railway Co.*, 9 Hare, 313; s. c. 12 Eng. L. & Eq. 229; *supra*, § 211. But an action may be maintained by the receiver of an insolvent corporation against the stockholders, to recover the sums received by them as dividends while the company was insolvent. *Osgood v. Laytin*, 40 N. Y. 521.

(a) Nor will the corporation be permitted to pay dividends out of income needed to keep up repairs. *Dent v. London Tramways Co.*, Law Rep. 16 Ch. Div. 344. The principle of the general rule forbidding the declaring of dividends when they have not been earned, is in some of the states, as in New York, embodied in statute. See *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162.

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2. After a dividend is declared, each party entitled has a right in severalty to his particular proportion.² (b) And therefore, one * party cannot bring a bill on behalf of himself and other shareholders, to enjoin the payment of a dividend already declared, until the entire line is opened, even where this is one of the express requirements of the charter of the company.³ For in such a proceeding the interests of those entitled to the dividend, after it is declared, become not only several and distinct, but positively adverse to each other, so that one cannot be said, in any proper sense, to represent the others as to a dividend already declared.³

² *Coles v. Bank of England*, 10 A. & E. 437; *Davis v. Bank of England*, 2 Bing. 393; s. c. 5 B. & C. 185; *Feistel v. King's College*, 10 Beav. 491; *Ohio City v. Cleveland & Toledo Railroad Co.*, 6 Ohio St. 489; *Carpenter v. New York & New Haven Railroad Co.*, 5 Abbott Pr. 277. After a dividend is declared by the directors of a corporation, if payment of his proportion is refused to any stockholder, he may recover it in an action against the corporation for money had and received. But the directors have a right to select a banking-house of good credit, and constitute it their agents, and may lawfully deposit in such banking-house money to pay the dividends, giving to each stockholder notice of such deposit. And if the stockholder, after having received due notice, neglect to draw his money within a reasonable time, and a loss is then incurred by a failure of the bank, such loss will fall wholly on the stockholder, and he cannot call on the company to reimburse him; but the burden of proof to show that due notice was given lies upon the company. The question what will constitute a sufficient notice is also discussed in the same case. *King v. Patterson & Hudson River Railroad Co.*, 5 Dutcher, 82.

³ *Carlisle v. Southeastern Railroad Co.*, 13 Beav. 295; s. c. 2 Hall & T. 366; 1 Macn. & G. 689; 6 Railw. Cas. 670. So also where the company has no surplus earnings, it may be restrained from paying a dividend already declared. *Carpenter v. New York & New Haven Railroad Co.*, 5 Abbott Pr. 277. And the declaring of dividends will be enjoined, after the capital has been increased by an accumulation of surplus, on the discovery of a deficit caused by the fraud of an officer of the company. *Fawcett v. Laurie*, 1 Drewry & S. 192; s. c. 8 W. R. 699. But a corporation, after having declared a dividend and paid it to the other stockholders, cannot defend against a suit to recover the same by one stockholder, on the ground that the dividend has not been earned, and that its payment would withdraw a part of the capital of the company. *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542.

(b) Mere profits form part of the assets, but a dividend, when declared, belongs to the several holders of the stock at the time of the declaration. *Southern Railroad Co.*, 84 N. Y. 157; *Jermain v. Lake Shore & Michigan Southern Railroad Co.*, 91 N. Y. 483; *Brisbane v. Delaware, Lackawanna, & Boardman v. Lake Shore & Michigan Western Railroad Co.*, 25 Hun, 438.

But as to future dividends, one shareholder may bring a bill on behalf of himself and others standing in the same relation, to enjoin the company from declaring future dividends, until they have completed their whole line according to the requirements of their charter.³ And as to dividends already declared, a bill brought in such a form as to make all parties interested, parties to the bill, might enable a court of equity to restrain its payment.³

3. A lien upon shares gives as an incident a lien upon the dividends, and a right to receive and retain them.⁴ (c)

* 4. And it has been held, that a surety of a shareholder may require the company to apply dividends due the principal, upon the debt, or prohibit the transfer of the stock where they hold a lien upon it, under penalty of his discharge; but without this requirement the corporation might allow the transfer to be made, without losing any right against the surety.⁵

5. It seems to be settled as a general rule, that an action will not lie against the company for dividends declared, until demanded, nor will interest accrue or the statute of limitations begin to run.⁶

³ *Hague v. Dandeson*, 2 Exch. 741. A dividend on stock paid after the death of the shareholder is not apportionable between tenant for life and remainder-man. *Plumbe v. Neild*, 6 Jur. n. s. 529. See *Wright v. Tuckett*, 1 Johns. & H. 266. Dividends declared on the shares of a testator after his death, but in respect of the profits made by the company in his lifetime, form part of the income, not of the *corpus* of his estate. *Bates v. McKinley*, 31 Beav. 280; s. c. 8 Jur. n. s. 299. And see, as to the apportionability of dividends under the English practice, *In re Maxwell*, 1 Hemm. & M. 610; s. c. 9 Jur. n. s. 350; *Scholefield v. Redfern*, 2 Drewry & S. 173; s. c. 9 Jur. n. s. 485. See also *Granger v. Bassett*, 98 Mass. 462.

⁴ *Perrin v. Fireman's Insurance Co.*, 22 Ala. 575.

⁵ *State v. Baltimore & Ohio Railroad Co.*, 6 Gill, 363; *Ohio City v. Cleveland & Toledo Railroad Co.*, 6 Ohio St. 489; *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Cowell*, 28 Penn. St. 329. An interesting case was recently decided in Pennsylvania, involving the rights of holders of scrip certificates issued in payment of stock dividends. The Lehigh Coal & Navigation Company, which was restricted to six per cent dividends out of profits to its stockholders, on the basis of an increased business and the enhanced value of its works and property, in accordance with a resolution of the stockholders, issued scrip certificates from time to time, entitling the holder to additional

(c) In general, the right to dividends follows ownership of stock. *Northwestern Railway Co.*, 21 Kan. 365; *Central Railroad & Banking Co. v. Ryan*, *Leavenworth, Atchison, & v. Papot*, 59 Ga. 342.

*SECTION II.

Party entitled to Dividends where Stock has been fraudulently transferred.

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| <p>1. Fraudulent transferee not entitled to dividends, but subsequent <i>bona fide</i> purchaser may be.</p> <p>2. The <i>bona fide</i> owner may so conduct as to forfeit his claim.</p> | <p>3. One who buys stock in faith of the title on company's books may hold, as against company.</p> <p>4. Transfer agent not authorized to bind company by representation.</p> |
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§ 241. 1. The party who has obtained a fraudulent transfer of stock into his own name, upon the books of the company, is never entitled to the dividends, and if the fraud is ascertained before the dividends are paid, the payment to such party may lawfully be resisted. But it often happens that the dividends are paid to such party before the fraud is discovered, or the shares may have been transferred to some innocent purchaser, in faith of the title of such fraudulent party appearing upon the books of the company. In such case, where there was no fault upon the part of the original owner, or where the transfer is made by a forged power of attorney, both the original owner and the innocent purchaser will be entitled, as against the company, to demand the dividends or their equivalent. The first, because he is still the owner of the shares, not being in any just sense bound by the transfer which the company have allowed upon their books without his concur-

shares of stock, distributing them ratably among share and scrip holders, in proportion to the amount held at the date of issue. The resolution embodied in the scrip provided that the scrip should not be entitled to any dividend until the funded debt of the company should be paid off, or adequate provision made for its discharge when due and payment demanded, nor until conversion of such scrip into stock. After conversion, certain of the scripholders claiming the back dividends which had been declared on the stock from the date of issue to the conversion of the scrip, it was held that the rights of the scripholders were to be measured by the contract under which it was issued, of which the scrip alone was the evidence; that this contract was but an engagement that the scripholders might become shareholders after payment of or provision made for the funded debt of the company; and that the scripholders were not entitled to dividends on the scrip, nor on the stock into which such scrip had been converted, except such as had been declared subsequent to the conversion. *Brown v. Lehigh Coal & Navigation Co.*, 49 Penn. St. 270.

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rence; and the latter, because he has been induced to pay his money for stock which the company allowed to stand upon their books, in the name of the vendor. These joint-stock companies are bound to look into the title of any one who claims to have stock transferred into his name on the books of the company.¹

* 2. In the case just cited, the former owner of the stock learned of the fraudulent transfer some months before he informed the * company, and in the mean time the offender left the country, and this was held no bar to his claim to the dividends. But it was considered that in this case, if the bank had paid the dividends to the fraudulent party, during the interval that the plaintiff withheld this information, he could not have recovered for such dividends. But a misprision of felony shall not have the effect to forfeit stock, to which the plaintiff has an indisputable title. In some of the American courts a similar doctrine is recognized.²

* 3. And if the company suffer the stock to stand upon their books, in the name of a naked trustee, without interest, and issue scrip in the name of such trustee, and a *bona fide* purchaser of the stock of such trustee advances money for it, he will be permitted to hold it against any lien the company may have upon it, as against the real owner of the stock.³

4. It was decided in the Superior Court of the city of New York,⁴ that the possession by the transfer agent of a corporation

¹ *Davis v. Bank of England*, 2 Bing. 393. Best, C. J., there says, "It is the duty of the bank to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is duly authorized to do so. They may take reasonable time to make inquiries, and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be. It is the bank, therefore, and not the stockholder who is to suffer, if, *for want of inquiry* (and it does not appear that any inquiry was made in this case), they are imposed upon, and allow a transfer to be entered in their books, made without a proper authority."

See also *Taylor v. Midland Railway Co.*, 28 Beav. 287; s. c. 6 Jur. n. s. 595; *Sloman v. Bank of England*, 14 Sim. 775; *Ashley v. Blackwell*, 2 Eden, 299; *Hare v. London & Northwestern Railway Co.*, Johns. Ch. Eng. 722; s. c. 8 W. R. 352; *Ex parte Swan*, 7 C. B. n. s. 400; s. c. 2 H. & C. 175; 10 Jur. n. s. 102.

² *Pollock v. National Bank*, 3 Seld. 274; *Sabin v. Woodstock Bank*, 21 Vt. 353; *Lowry v. Commercial & Farmers' Bank*, 6 West. L. J. 121, *per TANEY*, C. J.; *Cohen v. Gwinn*, 4 Md. Ch. 357; *supra*, §§ 32, 46 a.

³ *Stebbins v. Phoenix Fire Insurance Co.*, 3 Paige, 350.

⁴ *Henning v. New York & New Haven Railroad Co.*, 9 Bosw. 283.

of the transfer books of its stock, and his authority to allow them to be used, do not constitute the *indicia* of an authority to make representations as to the ownership of stock, so as to render the company liable for the falsity of such representations made by him. Nor will the mere permission given by such agent to enter upon such books a transfer of reputed stock, there being no new certificate given, amount to a representation by him that the person making the transfer was the owner of any genuine stock.

SECTION III.

Guaranty of Dividends upon Railway Stock.

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| 1. Guaranty of dividends for a term of
years. | 2. Rule of damages for breach. |
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§ 241 a. 1. Contracts for the guaranty of dividends upon railway stock, as a part of the contract of sale of shares in such stock, are not uncommon. Questions have arisen in regard to the proper construction of such contracts; whether they have reference to the quality of the stock, or merely to the product, for the particular period. (a)

In a case in Pennsylvania,¹ a contract of guaranty upon the * sale of two hundred shares of railway stock was in these words, that "said stock should yield annually six per cent dividends, for the space of three years from and after" a certain date, and it was held, that the guaranty had reference to the quality of the stock and not exclusively to the product for the specified term.

2. The rule of damages for the breach of such a contract was held to be the difference in value between the stock sold and one which would have produced the specified dividends for the term

¹ *Struthers v. Clark*, 30 Penn. St. 210. The exposition of the subject in the opinion of the court, is clear and satisfactory.

(a) And agreements between corporations, whereby one guarantees the other a certain dividend on its stock, are not unknown. Such a guaranty is not to stockholders severally, but to the corporation, and the power to modify it is not in the stockholders, but in the directors. *Flagg v. Manhattan Railway Co.*, 10 Fed. Rep. 413.

named in the contract.² But where a contract was for the delivery * of a bond issued by a railway company, and which guaranteed the payment of the same in full, it was held the measure of damages for the breach of the contract to deliver the bond was the value of the bond thus guaranteed by the defendant, and this, as against the defendant, must be regarded as the amount of the bond and the interest to the time of giving judgment.³

² The court, on this point, cited *Dyer v. Rich*, 1 Met. 180.

³ *Shelton v. French*, 33 Conn. 489.

* CHAPTER XXXV.

RIGHTS OF CREDITORS AND CORPORATORS.

SECTION I.

Dissolution of Railways.

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| <ol style="list-style-type: none"> 1. Different modes of dissolution. Act of the legislature. Surrender of franchise. Forfeiture, from abuse or disuse. 2. Shareholders not generally liable personally to creditors. 3. Shareholders entitled to proportionate share of net profits. 4. Subscribers liable when scheme is abandoned, but not for contracts of directors in certain cases. 5. Commonly liable for share of expenses. 6. Person receiving shares bound by terms of association. | <ol style="list-style-type: none"> 7. Subscriber not informed that deposits not paid on all shares, no fraud. 8. Shareholders cannot exonerate themselves by contract with directors. 9. Corporation cannot give away its effects, to prejudice of creditors. 10. Repeal of charter by virtue of power reserved, presumed to be rightful. 11. Transfer or forfeiture of shares. Exoneration of shareholders thereby. 12. <i>Bona fide</i> transfer with no trust in favor of vendor, held good. 13. Purchase of shares in consequence of the misrepresentations of directors or agents, not binding. |
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§ 242. 1. A RAILWAY corporation may be dissolved in the same manner as other private moneyed corporations:¹ (1) By act of parliament, which alone by the English constitution has inherent power to dissolve or repeal the charter of corporations, although the king may create them.² But the failure to hold meetings and elect officers is not, within reasonable limits, to be regarded as a dissolution of the corporation.³ (a) (2) By surrender to the legislature of all its corporate franchises, and the acceptance of

¹ If a corporation once had a legal existence, which is alleged to have been determined, it is necessary that the pleadings should show or set forth particularly the manner in which its corporate powers ceased. *Sutherland v. Lagro & Manchester Plank-Road Co.*, 19 Ind. 192.

² *Supra*, §§ 17, 17a, 166.

³ *Angell & Ames Corp.* § 771, and cases cited; *Smith v. Steamboat Co.*, 1 How. Miss. 470.

(a) Lease of the road does not dissolve the corporation. *United States v. Little Miami & Columbus & Xenia Railroad Co.* 1 Fed. Rep. 700.

such surrender.⁴ But the mere non-user * or abuse of its corporate franchises will not amount to a surrender. This must, in general, be effected by some distinct and unequivocal act of the corporation, accepted by the government.⁵ (3) By forfeiture of the corporate franchises, by disuse, or abuse, judicially declared, upon *scire facias* or *quo warranto* brought for that purpose.⁶ (b)

⁴ Angell & Ames Corp. § 772 ; 2 Kent Com. 310, and notes ; Missouri & Ohio Railroad Co. v. State, 29 Ala. 573.

⁵ Town v. River Raisin Bank, 2 Doug. Mich. 590 ; McMahan v. Morrison, 16 Ind. 172 ; 2 Kent Com. 312, and notes. A railway corporation is not dissolved by the sale of a part, or all of its road, on execution. State v. Rives, 5 Ire. 297, 309. See Commonwealth v. Tenth Massachusetts Turnpike Co., 5 Cush. 509 ; State v. Maryland Bank, 6 Gill & J. 205 ; De Ruyter v. St. Peter's Church, 3 Comst. 238 ; Bruffett v. Great Western Railway Co., 25 Ill. 353.

⁶ Angell & Ames Corp. § 774. Eastern Archipelago Co. v. Queen, 2 Ellis & B. 856 ; s. c. 22 Eng. L. & Eq., 328 ; s. c. 1 Ellis & B. 310 ; 18 Eng. L. & Eq. 167 ; *supra*, § 166. A corporation cannot, except with the consent of the legislature, alienate its property (as where all the stock in one railway is subscribed by another railway, which has the entire control of the first corporation) and thus relinquish the control and management of its affairs, so as to divest itself of further responsibility. York & Maryland Line Railroad Co. v. Winans, 17 How. 30.

In *Baltimore v. Connellsville & Southern Pennsylvania Railroad Co., Leg. Int.* the court thus define the expressions 'misuse' or 'abuse' of corporate franchises ; " There can be no abuse or misuse without a positive act of malfeasance. This, to furnish ground of forfeiture, must be wilful. It must be something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power. . . . There is nothing profound or mystical about these terms, 'misuse' or 'abuse.' They are not terms of art in the law. The popular sense in which they are used every day is well known. To abuse is compounded of *ab* and *utor* ; and in strictness it signifies to injure, diminish in value, or wear away by improperly using. . . . Misuse is a still simpler word. It signifies simply to use amiss. But I admit that these words, like all others, may have different meanings when spoken with reference to different subjects. Acts which would be an abuse of one thing, may be no abuse of another. We are, therefore, to ascertain what is 'abuse or misuse' of the corporate privileges by the company. Abuse includes misuse. We may take them both together, and define them thus : Any positive act in violation of the charter, and in derogation of public right, wilfully done, or caused to be done, by those appointed to manage the general concerns of the corporation."

In *People v. Albany, & Vermont Railroad Co.*, 24 N. Y. 261, it is held that

(b) See *Wisconsin v. West Wisconsin Railway Co.* 34 Wis. 197.

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This is the only mode in which a forfeiture of * corporate franchises can be determined, and such question cannot be collaterally raised in suits instituted by the corporation, as the state may waive any forfeiture committed by the corporation.⁷

2. The rights of creditors against the corporation will depend upon the charter and the general statutes in force at the time of its creation and dissolution.⁸ But there is no responsibility of

a railway corporation, chartered to operate a railway between A. and B., cannot legally operate it between A. and C. only, C. being a way station between A. and B., and abandon that part of the route lying between B. and C., and that if it does so, its charter may be vacated, or its corporate existence annulled by proper proceedings, though a suit in equity to compel the maintenance and operation over the whole track, cannot be maintained. And the legislature cannot declare the charter of a corporation forfeited. This power belongs only to the courts. *Bruffett v. Great Western Railroad Co.*, 25 Ill. 353.

⁷ *State v. Fourth New Hampshire Turnpike Co.*, 15 N. H. 162; *Young v. Harrison*, 6 Ga. 180; *Bank v. Trimble*, 6 B. Monr. 599; *Johnson v. Bentley*, 16 Ohio, 97; 16 S. & R. 140; *Union Branch Railroad Co. v. East Tennessee & Georgia Railroad Co.*, 14 Ga. 327; *Illinois Central Railroad Co. v. Rucker*, 14 Ill. 353; *People v. Pontiac Bank*, 12 Mich. 527; 5 Johns. Ch. 366; 19 Johns. 456. But a charter may be made dependent on the performance of conditions precedent, in such a form, as that non-performance will work a forfeiture. *Parmelee v. Oswego & Syracuse Railroad Co.*, 7 Barb. 599. See also *R. M. Charl.* 250; *Wilmans v. Illinois Bank*, 1 Gilm. 667; *Enfield Tollbridge Co. v. Connecticut River Railroad Co.*, 7 Conn. 28; 23 Wend. 222; 11 Ala. 472; *Brookville & Greensburg Turnpike Co. v. McCarty*, 8 Ind. 392; *supra*, § 18.

After the forfeiture judicially determined, the company can do no act, unless its power and capacity for that purpose are continued by statute. *Saltmarsh v. Planters' & Merchants' Bank*, 17 Ala. 761. See also *Attorney-General v. Petersburg & Roanoke Railroad Co.*, 6 Ire. 456, where the state is held bound by an implied waiver of forfeiture of corporate charters. But see *People v. Pontiac Bank*, 12 Mich. 412.

In one case in New York, it is held that if there is any defect in the proceedings for the organization of a corporation, or any abuse of its powers or of the statute authorizing the formation of corporations under general or special laws, the question is one of law, and it is for the state alone to take steps to dissolve such corporation, or forbid the exercise by it of corporate rights and franchises. The courts of equity will not take cognizance of such questions in regard to corporations. *Doyle v. Peerless Petroleum Co.*, 44 Barb. 239. The same doctrine is maintained in *Sturges v. Knapp*, 81 Vt. 1.

⁸ See *Blake v. Concord & Portsmouth Railroad Co.*, 39 N. H. 435. It is here held under a statute provision that suits may be brought by or against a corporation within three years after its dissolution, that no repeal of the char-

the shareholders beyond the amount of their subscriptions, in the absence of special liability imposed either by the charter or the general laws of the state in force at the time of the incorporation.⁹

3. The rights of shareholders will be to a proportion of the assets of the company, where it had already gone into operation, and the managers and directors were guilty of no fraud, either in * the management or closing up of the concerns of the company. But where a scheme is set on foot, and a prospectus issued, stating that all money deposited will be laid out at interest, and after some subscriptions had been paid to the directors, who had the management of the concern, but before any money was laid out, the directors resolved to abandon the concern, it was held, that each subscriber might recover of the directors the whole sum paid in by him, in an action for money had and received, without the deduction of any part towards the expense of the concern.¹⁰

4. And where the company goes into operation without the subscription of the full number of shares limited in the charter, it is an irregularity, and may become a fraud in those who consent, but it will not render those shareholders liable upon the contracts of the directors, who do not assent to the company thus going into operation.¹¹ So, too, where the party is induced to pay

ter of a corporation can take away or impair the remedy of a creditor against it for previously incurred liability, or affect a pending suit against it.

⁹ *Infra*, § 244. And see *Hoffman v. Van Nostrand*, 42 Barb. 174.

¹⁰ *Nockels v. Crosby*, 3 B. & C. 814 ; *Walstab v. Spottiswoode*, 15 M. & W. 501 ; s. c. 4 Railw. Cas. 321. In this case the prospectus promised to issue scrip, on demand, for the full sum deposited, but that was refused, and the party was held entitled to recover the full sum deposited. *Ashpittel v. Sercombe*, 5 Exch. 147 ; *Chaplin v. Clarke*, 4 Exch. 403.

¹¹ *Pitchford v. Davis*, 5 M. & W. 2 ; *Fox v. Clifton*, 6 Bing. 776 ; *Bourne v. Freeth*, 9 B. & C. 632. In *Sisson v. Matthews*, 20 Ga. 848 ; s. c. 17 Ga. 514, it was attempted to charge the members of a manufacturing corporation, in equity, on the ground that the defendants were originally carrying on the same business, as a copartnership, and obtained the act of incorporation, and transferred the business and responsibility to the corporation, with a view unjustly and fraudulently to exonerate themselves, save their former losses, and thereby impose a corresponding loss on subsequent creditors of the corporation, and it was alleged that in the petition for the act of incorporation, the defendants falsely represented the works of the copartnership as in actual operation, and as having more assets than it really had, and that the plaintiffs

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his * money and execute the subscribers' deed, under a false representation by the defendants, the managing directors, and the scheme is finally abandoned, the plaintiff is entitled to recover his whole money, as upon a failure of consideration.¹²

5. But where the amount of the capital to be raised is stated in the prospectus as *not exceeding* £700,000, and the sum actually subscribed is less, the subscribers are not excused from paying their proportion of the expenses on that account.¹³ And the managing committee, who subscribe for shares and pay deposits in order to comply with the standing orders of the House of Commons, will not be allowed to treat this as a loan to the company, as this would be an express fraud upon parliament, but they are liable the same as other subscribers.¹⁴ But where no fraud is shown to induce the plaintiff to sign the parliamentary contract and subscribers' agreement, he cannot recover his deposit as money had and received, or any portion of it, although the scheme had proved abortive, the contract subscribed giving the managers power to expend the money in carrying forward the undertaking in a particular mode, and they having expended it in that manner.¹⁵

6. And the party having made his application for shares in such an undertaking, and paid his deposit and received scrip certificates in the usual form, stating that the parliamentary contract

relied on such representation, and so gave credit to the corporation. The court held that there was no such sequence between the representation and the credit given as to form the basis of an obtaining of a false credit; and that, the act of incorporation not having annexed any conditions to the charter, it was not competent to qualify the liability of the corporators by going behind the act of incorporation. The court seemed to concede that if the defendants had induced the credit, by a substantial misrepresentation in regard to the funds or liabilities of the corporation, made directly to the plaintiffs for that purpose, and with that intent, they might be liable, in this form, to indemnify the plaintiffs against the loss which they sustained.

¹² *Wontner v. Shairp*, 4 C. B. 404; *Jarrett v. Kennedy*, 6 C. B. 319. And a shareholder who is liable to contribute to the expenses of a collapsed company, and who is also a creditor of the concern, cannot set off his debt against the call on his shares, but must first pay calls, and then share with other creditors in the avails. *Grissell's Case*, 12 Jur. n. s. 720.

¹³ *Watts v. Salter*, 10 C. B. 477. See *supra*, § 2 and notes.

¹⁴ *Clements v. Bowes*, 1 Drewry, 184; 21 Eng. L. & Eq. 471; s. c. 8 Eng. L. & Eq. 238; *Uffill's Case*, 14 Jur. 843; s. c. 1 Eng. L. & Eq. 13.

¹⁵ *Garwood v. Ede*, 1 Exch. 264; *Atkinson v. Pocock*, 1 Exch. 796; *Jones v. Harrison*, 2 Exch. 52; *Willey v. Parratt*, 3 Exch. 211.

and subscribers' agreement had been subscribed by the person to whom the certificate was issued, is bound by such contract and agreement, the same as if he had subscribed them.¹⁶

* 7. And it was held, that the fact that the plaintiff is not informed that deposits had not been paid upon all shares allotted, at the time the plaintiff subscribed for shares, is no such fraud as will exonerate him from his obligation.¹⁷

8. By the deed of settlement of a joint-stock company no shares could be transferred without the consent of the directors; the company being unprosperous and getting into serious disputes, the shareholders agreed to pay a sum to the directors, in full discharge of their liabilities, which was accepted, and transfers made accordingly, and the shareholders retired. The company being ordered to be wound up, it was held that the retiring shareholders were still liable as contributories.¹⁸

9. An insolvent corporation cannot give away its effects, to the prejudice of its creditors; and any arrangement between the company and the shareholders to enable them to escape from their just liabilities to the company, to the prejudice of their creditors, will be void both in equity and at law.¹⁹ But this will not preclude the company from allowing legal or equitable set-offs, upon debts due them.¹⁹

10. Where the legislature, either in granting a charter to a company or by the general laws of the state, have a reserved right to repeal the charter, and the right is accordingly exercised, courts will *prima facie* presume in favor of the regularity of the act.²⁰

¹⁶ *Clements v. Todd*, 1 Exch. 268; *Carrick's Case*, 1 Sim. N. S. 505; s. c. 5 Eng. L. & Eq. 114. But he is not a contributory for expenses, unless he authorizes them. *Ib.* *In re Sunken Vessels Recovery Co.*, 3 De G. & J. 85; s. c. 5 Jur. N. S. 1377; *New Brunswick & Canada Railway & Land Co. v. Muggeridge*, 4 H. & N. 580; s. c. 5 Jur. N. S. 1131.

¹⁷ *Vane v. Cobbold*, 1 Exch. 798.

¹⁸ *Ex parte Bennett*, 18 Beav. 339; s. c. 5 De G. M. & G. 284; 27 Eng. L. & Eq. 272.

¹⁹ *Goodwin v. McGehee*, 15 Ala. 232.

²⁰ *State v. Curran*, 7 Eng. 321. But to make the surrender of a corporate charter effectual, it is necessary that it be accepted by the government, and that this appear of record. *Norris v. Smithville*, 1 Swan Tenn. 164. The repeal of a charter vests the public work in the state, to be managed by the state or regranted, at its election. *Erie & Northeast Railroad Co. v. Casey*, 26 Penn. St. 287.

11. Shareholders cannot exonerate themselves from their statutory liability, either for the debts of the company or expenses incurred by a transfer of their shares to irresponsible persons.²¹ But a *bona fide* forfeiture of shares, whether confirmed by the company or not, if acquiesced in by the share-owner and the company, * will release such owner from all responsibility thereafter accruing.²² But even when the company declare a forfeiture of shares, it will not have the effect to exonerate the holder, if done without any legal warrant for the act.²³

12. But where the transfer is made for the purpose of enabling the transferee to become a director, or for any other *bona fide* purpose, and not merely to evade the statutory responsibility, it will be regarded as valid and not impeachable in equity.²⁴ And even when sold at a nominal price, and because the vendor anticipated a disastrous result in the affairs of the company, if *bona fide*, and no trust exists in behalf of the vendor, it will be regarded as valid.²⁵

13. Where one is induced to take shares from the company, in consequence of the misrepresentations of the directors and agents of the company, the membership is not in general regarded as binding upon the purchaser.²⁶ But where a party is thereby induced to purchase shares of third parties, his membership is valid.²⁶ So, also, if the first purchaser had conveyed the shares to a *bona fide* purchaser.²⁷ But where one is induced to buy shares of the company by the fraudulent representation of a stranger the membership is valid.²⁸

²¹ *Ex parte* Lund, 27 Beav. 465 ; s. c. 5 Jur. n. s. 400.

²² *In re* Home Life Assurance Co. 4 De G. & J. 437 ; s. c. 5 Jur. n. s. 853.

²³ *Ex parte* Barton, 5 Jur. n. s. 420 : s. c. 4 Drewry, 485.

²⁴ *In re* London & Comity Assurance Co. 2 De G. & J. 638 ; s. c. 5 Jur. n. s. 1 ; *Ex parte* Bigge, 5 Jur. n. s. 7.

²⁵ *Ex parte* De Pass, 5 Jur. n. s. 1191.

²⁶ *In re* Liverpool Borough Bank, 26 Beav. 268.

²⁷ *Ex parte* Worth, 4 Drewry, 529 ; s. c. 5 Jur. n. s. 504.

²⁸ *Ex parte* Ayres, 25 Beav. 513.

SECTION II.

Levy on Property of Company.

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| 1. Lien created by charter is paramount to all others. | 2. Road, or tolls, not subject to levy of execution. |
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§ 243. 1. Where the statute of the state provided that the state shall subscribe for half the stock in all incorporated railway and turnpike companies, and have a lien upon the property of the company to the extent of the money advanced by the state, as a corporator, * to secure the payment of the other half of the stock by individual subscribers, it was held that the property of such corporation was not liable on *fi. fa.* for its debts till the lien of the state was extinguished by the payment of the stock.¹

2. It has been held that creditors cannot levy their executions upon a turnpike road,² and the same rule will necessarily apply to railways. And it has been determined that a judgment lien which attaches only to estates in land, does not bind tolls collected after the rendition of the judgment.³ (a)

¹ State v. Lagrange & Memphis Railroad Co., 4 Humph. 488.

² Ammant v. New Alexandria & Pittsburg Turnpike, 13 S. & R. 210. Other real estate of the company may be levied on, but if it be joined in one levy with the road the whole levy is void. In a subsequent case it was held, that the toll-house of a turnpike company was so far an integral part of the franchise and a necessary incident, that it was not liable to the levy of an execution by the creditors of the company. Susquehanna Canal Co. v. Bonham, 9 Watts & S. 27. See also James v. Pontiac & Groveland Plank Road Co., 8 Mich. 91. But where a railway company obtains the fee of land and constructs its road on it, and afterwards abandons its use for all purposes of the road, the creditors of the company may levy on it. Benedict v. Heineburg, 48 Vt. 231.

³ Leedom v. Plymouth Railroad Co., 5 Watts & S. 265; s. c. 2 Am. Railw. Cas. 232.

(a) In the absence of statute, the franchise, it has been held, is not subject to levy for the payment of debts. 1225. But the matter has been to some extent regulated by statute in various states, as in Texas, New Jersey, Georgia, &c., and also in England and in Canada. New Orleans, Spanish Fort, & Lake Railroad Co. v. Delamore, 34 La. An.

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SECTION III.

Proceedings against Shareholders.

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| 1. Execution under English statute, mode of obtaining.
2. Remedy, in this country in general, by distinct suit.
3. Under statute of New York creditor may proceed in equity. | 4. Payment of subscription in land may discharge the shareholder.
5. Transfer of personal liability, how shareholder may make.
6. Corporation cannot shield property from the levy, to protect a mortgagee who himself does not appear. |
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§ 244. 1. By the thirty-sixth section of the English Companies' Clauses Consolidation Act of 1845, it is provided, that if execution shall have issued against the company and proved unproductive, it may issue against any shareholder to the extent of his shares remaining unpaid; this execution not to issue except upon the order of the court. It is a general rule that where a party out of the record is made subject to execution, the proper mode of procedure is by *scire facias*.¹ It seems that something more must be * shown than the mere return of *nulla bona*, as to the company. *Bona fide* and substantial efforts must be first used to obtain payment of the company.²

¹ Cross v. Law, 6 M. & W. 217; Ransford v. Bosanquet, 12 A. & E. 813. This is a decision in the Exchequer Chamber, where the award of execution in the King's Bench is reversed, on the ground that it should be by *scire facias*, but not on suggestion or motion merely. A similar decision is made ten years later, in 1850, in Hitchins v. Kilkenny & Great Southern & Western Railway Co., 10 C. B. 160; 1 Eng. L. & Eq. 357. The court will not grant a *scire facias* against a party as a shareholder in a company on a judgment obtained against the company, unless the affidavits show reasonable grounds for believing that the party sought to be charged is a shareholder. Edwards v. Kilkenny & Great Southern & Western Railway Co., 14 C. B. N. s. 526; *In re Mather v. National Assurance Association*, 14 C. B. N. s. 676. And the fact that one has applied for and received an allotment of shares, and paid a deposit thereon, is not enough. Edwards v. Kilkenny & Great Southern & Western Railway Co., *supra*.

² Eardley v. Law, 12 A. & E. 802; Hitchins v. Kilkenny & Great Southern & Western Railway Co., *supra*; s. c. 15 C. B. 459; 29 Eng. L. & Eq. 341. But where the debtor could not find sufficient property of the company to satisfy his whole execution, he was held entitled to have execution in the first instance against a shareholder. Ilfracombe Railway Co. v. Poltimore, Law Rep. 8 C. P. 288.

The *scire facias* must state that the party is a shareholder, and the amount unpaid, and that execution has issued against the company and been found unavailing, all which is traversable.³ * It is sometimes said to be discretionary with the court whether to issue execution against a shareholder, even where it is shown that a former one against the company has proved unavailing. But this can only import that the court have a discretion to determine when the party claiming the execution brings himself within the spirit of the statute.⁴

In the case of the Kilkenny & Great Southern & Western Railway Co. in Ireland, which had an office in London, the Court of Exchequer granted *scire facias* against a director, upon proof of his declaration at a meeting of the body that they had no funds to meet their obligations, in consequence of the shareholders not paying calls, although perfectly able to do so.⁵ If in this way a shareholder should be compelled to pay more than is due from him, he is to be reimbursed by the company.⁶

³ *Devereux v. Kilkenny & Great Southern & Western Railway Co.*, 5 Exch. 834; s. c. 1 Eng. L. & Eq. 481. In this case, while the court hold that *scire facias* is the appropriate remedy to obtain execution against a shareholder, POLLOCK, C. B., protests that a less formal mode, as by suggestion or motion, is equally competent. In Iowa an execution against a corporation was returned "no property found," and the plaintiff served a notice on the company in its corporate name to show cause why the individual property of the members of the corporation should not be made liable. At the next term a default was taken and the court heard the cause, found that the judgment was recovered, that an execution had been issued, and so returned that the corporation was duly organized; that each share was so much; that the debt on which the judgment was recovered was contracted after the company was organized, and after the subscription of stock; that there was no corporate property to satisfy the judgment; that a schedule setting forth the names of the stockholders, the number of shares subscribed by each, the amount of each subscription, the amount called in, the amount unpaid, and the whole amount of unpaid stock due from each stockholder, was true; and rendered a judgment that the individual property of the members of the company to the amount of stock subscribed by each and not yet paid be subjected to said judgment, and that execution issue, to be levied on the private property of the members, to the amount of stock subscribed by each and not yet paid. It was held that the court could not proceed at that stage of the case and in that manner to adjudge who were the stockholders, and in what amount each was liable. *Donworth v. Coolbaugh*, 5 Iowa, 300.

⁴ 1 Shelf. Railw. Bennet's ed. 224; *Hodges Railw.* 92.

⁵ *Devereux v. Kilkenny & Great Southern & Western Railway Co.*, 5 Exch. 834; s. c. 1 Eng. L. & Eq. 481; *Walsh Railw.* 236.

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It is no defence to the *scire facias* against the shareholder that he was requested by the plaintiff to become a transferee of shares in the company as the nominee of others and not on his own behalf; and that on the representation of the plaintiff that by so doing he would incur no responsibility whatever in regard to such shares, the defendant was induced to become such transferee for the purpose aforesaid and no other; and that the defendant never had any interest in the shares or in the company, except for those purposes, and never derived any profit therefrom, and that the company never commenced their work, and the scheme was now wholly abandoned. And further, that plaintiff was privy and stood by and consented to all the above facts and occurrences, and suffered, permitted, and induced the defendant to become the transferee of shares upon the representations and expectations thereby created, as above detailed, and is now unjustly and fraudulently seeking to charge the defendant and make him responsible and liable as a shareholder of the company, in violation of his representations and assurances thus before given.⁶

The court here seem to go upon the ground that the defence offered did not show a fraudulent purpose on the part of the plaintiff, but only the expression of an honest opinion. The time at which persons must be shareholders in order to become liable * for the debts of the company is the date of the return of *nulla bona*.⁷

And by the English statutes, if the inspection of the register of shareholders is withheld from any creditor, he may file an affidavit stating that fact and the best knowledge he can obtain of who are the shareholders, and this unanswered will be sufficient to entitle him to execution against the persons named as shareholders in the affidavit.⁸ Or he may proceed by mandamus to compel the production of the register.⁹ And it will not deprive the party of his remedy against the shareholders that he first issued an *elegit* against the lands of the company, which proved unproductive,⁹ or

⁶ Bill v. Richards, 2 H. & N. 311.

⁷ Nixon v. Brownlow, 3 H. & N. 636. As to the mode of procedure in such cases under the English statutes, see Ilfracombe Railway Co. v. Devon & Somerset Railway Co., Law Rep. 2 C. P. 15; Kernaghan v. Dublin Trunk Connecting Railway Co., Law Rep. 3 Q. B. 47.

⁸ Rastrick v. Derbyshire, Staffordshire, & Worcestershire Junction Railway Co., 9 Exch. 149; s. c. 24 Eng. L. & Eq. 405.

⁹ Regina v. Derbyshire, Staffordshire, & Worcestershire Junction Railway Co., 3 E. & B. 784; s. c. 26 Eng. L. & Eq. 101.

that there are funds belonging to the company in the hands of the official manager of the company under the winding-up acts.¹⁰

And in reply to the *scire facias* the shareholder may show that the judgment was collusive or void, as against the company, or that it grew out of the employment of counsel in a matter *ultra vires* as to the corporation.¹¹

2. In this country the shareholders are, by statute, often made liable for the debts of the corporation, in default of payment by it after judgment recovered. (a) Under these statutes, a distinct action is to be brought against the company. But the shareholders are generally regarded as so far privy to the judgment against the company as to be concluded by it.¹² And in such action the *organization of the company is sufficiently shown by proof of the charter, and the transaction of the proper business under it for which it was created.¹²

¹⁰ McKenyon v. Shannon Railway Co., 4 Ellis & B. 119.

¹¹ Shedden v. Patrick, 1 Macq. Ap. Cas. 535; Edwards v. Railway, 2 C. B. N. s. 397. See Scott v. Uxbridge & Rinkmansworth Railway Co., Law Rep. 1 C. P. 596; s. c. 12 Jur. N. s. 602.

¹² Came v. Brigham, 39 Me. 35; Donworth v. Coolbaugh, 5 Iowa, 300; Cummings v. Maxwell, 45 Me. 190; Milliken v. Whitehouse, 49 Me. 507; New England Bank v. Newport Steam Factory, 6 R. I. 154. But it has been held under such statutes that the shareholders are in general liable only for the debts of the corporation, contracted while they were such. Chesley v. Pierce, 32 N. H. 388; Moss v. Oakley, 2 Hill, 265; Moss v. McCullough, 5 Hill, 131. And in Shaler & Hall Quarry Co. v. Bliss, 27 N. Y. 297, it was held that the statute liability of a trustee of a manufacturing company, who was in office when default was made in publishing the required annual report, is limited to debts incurred while he remains such trustee, and does not include a debt contracted after he ceased to hold that office, though while the default continued. But see Curtis v. Harlow, 12 Met. 3; Southmayd v. Russ, 3 Conn. 52; 5 Conn. 28; 10 Conn. 409, where it seems to be considered that the suit may be maintained against all who are shareholders at the time the suit is brought. And though others may have a lien on, or equitably own stock in a corporation, the legal liability for debts of the corporation rests on him in whose name the stock is registered. Richardson v. Abendroth, 43 Barb. 162. See Fuld v. Cooke, 16 La. An. 153. In Conant v. Van Schaick, 24 Barb. 87, and three other cases, decided on the same argument, it was held that where the statute made the corporators liable for the debts of the company of a certain descrip-

(a) So in Missouri. See Griswold v. are unpaid. Gausen v. Buck, 68 Mo. Seligman, 72 Mo. 110; Fisher v. Seligman, 75 Mo. 13. But only to the extent to which their subscriptions are unpaid. So in Oregon. See Branson v. Oregonian Railway Co., 10 Oreg. 278. So in Ohio, and in other of the states.

*3. Where the statute makes the stockholders liable jointly and severally to the amount of their stock, for the debts of the com-

tion, but required the creditor first to pursue his claim to judgment against the company, it entered into the essence of every credit given to the company, and was a part of the contract by which the debt was incurred that the corporators should be held liable as general partners.

And where the statute in such case provided that the amount of the recovery against the corporator should be the amount of the execution issued on the judgment recovered against the company, it was held incumbent on the creditor to show, independent of the judgment, that his claim was of the class for which the statute gave a remedy against the company, and that the amount due on the execution was the rule of damages. *Ib.*

The statute in this case provided that the "stockholders shall be jointly and severally liable for all debts due or owing to any of its laborers and servants, for services performed for such corporation." It was held that an action lay in favor of all persons employed in the service of the company, whether as engineers, master mechanics, or conductors, who did not come under the distinctive appellation of *officers* or *agents* of the company; and a servant who employed and paid men to work with him might recover, the same as if he had performed the service himself. *Ib.* The court profess to decide the case on the authority of *Corning v. McCullough*, 1 Comst. 47. And in *Richardson v. Abendroth*, 48 Barb. 162, it was held that the servant of a manufacturing corporation in performing the duties incident to his office is a servant of the company within the meaning and intent of the statute. See also 7 Barb. 279. But in the later case of *Strong v. Wheaton*, 38 Barb. 616, it was decided that the stockholders are not bound by the acts or declarations of the foreman of the company, he not being in any respect their agent, and that a judgment recovered against the corporation by an employé is not even *prima facie* evidence of the amount due from the company in a subsequent action against a stockholder. The plaintiff must in such action prove the existence of the corporation, the fact that defendant is a stockholder, the recovery of judgment against the company, the issuing of execution and the return of the same unsatisfied to some extent, and the performance of the service for which he seeks to charge the defendant. And it is here held that notwithstanding the statute allowing all or any party to be sued in the same action who are liable on the "same obligation," that an action cannot be maintained against two stockholders without joining all, on the ground that the word 'obligation' extends only to written contracts and will not embrace actions for work and labor. A consulting engineer is not a "laborer" within the meaning of the statute making stockholders liable for debts due from the company to their "laborers and operatives." *Smithson v. Brown*, 38 Barb. 390. It must appear that the claim is for the services of a laborer or servant of the company, and a contractor does not come within the meaning of the statutes. *Boutwell v. Townsend*, 37 Barb. 205. The personal liability of the stockholders of an insolvent corporation is several, not joint, and the admissions of one defendant are not admissible against another. *Simmons v. Sisson*, 26 N. Y.

pany, and provides that where any creditor's debt has been refused payment, on proper presentment, he might sue any one or more of the stockholders, it was held that a creditor might, under the New York Revised Statutes, file his bill in equity against the company and such stockholders as were known to him, to charge them with the payment of the debt, and might pray a discovery of the names and residences and amount of stock of the other shareholders, with a view to charge them also.¹³

264. And qualifications of this remedy against the shareholders are held not to impair the obligation of the contract. *Story v. Furman*, 25 N. Y. 214. In *Donworth v. Coolbaugh*, 5 Clarke, 300, it was held that the repeal of a general incorporation law neither destroys the existence of corporations organized under such law, nor changes the liability of stockholders in such corporations incurred under the provisions of such law. But in *Hawthorne v. Calef*, 2 Wal. 10, it was held that a state statute, repealing a former statute, which made the stock of stockholders of an incorporated company liable for the corporate debts, is, as respects creditors of the company at the time of such repeal, a law impairing the obligation of contracts, and void.

It was held in *Green v. Relf*, 14 La. An. 828, that where a majority of the stockholders of a company have the right to order the winding-up and liquidation of the affairs of the company, and a majority of them sign an obligation to pay their proportion of the outstanding corporate debts, they cannot be released from their obligation on the ground that it was not binding on any stockholders until all had signed.

¹³ *Bogardus v. Rosendale Manufacturing Co.*, 8 Seld. 147. See also *Morgan v. New York & Albany Railroad Co.*, 10 Paige, 290. And see *Cleveland v. Marine Bank*, 17 Wis. 545. But in New York, after the appointment of a receiver to take charge of the effects of an insolvent railway corporation, under the general railway act of New York, all remedies against the corporation being expressly suspended, this extends, by implication, to actions against the stockholders to enforce the debts of the company. *Rankine v. Elliott*, 16 N. Y. 377. And in *Cummings v. Maxwell*, 45 Me. 190, it was held that the remedy which creditors of a corporation have against the individual members for corporate debts, exists by statute only; and that the legislature may change or restrict it on pre-existing as well as on subsequent contracts. And in New Hampshire, since the passage of chapter 1962, Pamphlet Laws, no action at law can be maintained against any individual stockholder in a railway corporation, for a debt of the corporation, even though demand has been legally made on such corporation, and proper notice given to such individual stockholder. And where there were other stockholders at the time the debt was contracted, a bill in equity cannot be maintained against each individual stockholder alone for a debt of the corporation, but those against whom such stockholder would have a remedy over for contribution must be made parties with him. *Hadley v. Russell*, 40 N. H. 109. But in Rhode Island it was held, under statutory provisions making the stockholders liable for unsatisfied

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* 4. In Pennsylvania,¹⁴ under a statute making the shareholders of a corporation liable to the creditors to the amount of their un-

corporate debts as copartners, that payment of the whole debt might in the first instance be exacted at law from any living, or in equity from the estate of any deceased stockholder, and that the person or estate thus paying the debt should be left to his remedy over by himself; but living stockholders, and the representatives of those deceased liable to the debt, must be made parties defendant to the bill seeking such remedy against the estate of a deceased stockholder; and if his real assets are sought to be charged, his heirs-at-law must also be made parties, in case of intestacy, and his devisees if there be a will; and the same creditor cannot enforce in the same bill against the estates of deceased stockholders different debts, for which all the estates pursued are not liable, but he may in the same bill seek relief out of the estates of two or more stockholders, all of them being liable for his debt. *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154.

And under the New York statutes, one stockholder of a corporation cannot maintain an action against his fellow-stockholders to enforce a personal liability for a debt of the company. *Richardson v. Abendroth*, 43 Barb. 162. The construction of the statute of Maine on this point is discussed in *Ingalls v. Cole*, 47 Me. 530; *Coffin v. Rich*, 45 Me. 507. And the statutes of one state, making personal liability for corporate debts a penalty for breaches of the duties imposed on the officers of corporations, cannot be enforced in another state. *Derrickson v. Smith*, 3 Dutcher, 166. The stockholders of a corporation formed in New Jersey, under the laws of New York, are considered in the former state to be individually responsible for corporate debts as partners. *Hill v. Beach*, 12 N. J. Eq. 31. In *Mathews v. Albert*, 24 Md. 527, where the statute made the stockholders in corporations severally liable to the creditors, to an amount equal to their stock, for all debts incurred by the company before the capital was paid in; on a bill brought in equity against certain shareholders who had not paid in full, it was held that they could not set off loans by them to the company, in defence of this claim. But where the corporation is established in New Hampshire, where, by law, the stockholders are made personally responsible for its debts, by reason of the failure to pay in the whole amount of the capital stock, a creditor cannot maintain a bill in equity in Massachusetts to enforce his claim against the stockholders, although some of them reside there, and the bill is alleged to be brought in behalf of all the creditors. *Erickson v. Nesmith*, 4 Allen, 233. The plaintiff is proceeding against stockholders for the debts of the company, on the ground of some default of the corporation in complying with the statutory requirements, and it is not incumbent on the defendants in their answer, to make any specific denial of the failure of the corporation to comply with the statutes: the plaintiff must prove that as part of his own case. *Hutchins v. New England Coal Mining Co.*, 4 Allen, 580.

¹⁴ See *Patterson v. Wyomissing Manufacturing Co.*, 40 Penn. St. 117; *Megargee v. Wakefield Manufacturing Co.*, 48 Penn. St. 442; *Gunkle's Appeal*, 48 Penn. St. 13; *Patterson v. Arnold*, 45 Penn. St. 410; *Hoard v. Wil-*

paid subscriptions, * it was held that payment in lands conveyed to the company, which were necessary, and authorized for the enjoyment of its franchises, would discharge the liability, and that they would not be affected by after-discovered error in the judgment of the company as to the value of the lands.¹⁵ And the consent of such stockholder, by being present and acting as director at a meeting where the directors nullified such payments in land, but gave the subscribers a right to surrender their certificates issued thereon, and take new certificates for the amount of money paid by them, does not render him liable if he offer to surrender his certificate and take one for his money payments only.¹⁵

5. Where the general statutes of the state, or the special act of the company, render the stockholders personally liable for the debts of the corporation, they remain holden, notwithstanding the transfer of their stock after the debt accrued, until all the requirements of the act for their release have been strictly complied with. And if the act allows creditors to take certain proceeding, by way of notice to stockholders, to prevent their release from liability by the transfer of their stock, and such proceeding has been taken, the liability will continue.¹⁶

* 6. The corporation cannot shield its property from attachment or levy of execution upon the ground of the state or any other mortgagee having a prior lien upon it.¹⁷ The mortgagee must

cox, 47 Penn. St. 51. The individual members cannot set up their own faults or mistakes of organization as a defence against creditors. *McHose v. Wheeler*, 45 Penn. St. 32. See *Allibone v. Hager*, 46 Penn. St. 48.

¹⁵ *Carr v. LeFevre*, 27 Penn. St. 413. In Indiana, where the directors of the corporation alone are authorized to receive real estate, if they are not elected until after the subscriptions to preliminary articles are complete, it would seem that real estate subscriptions cannot be taken on such articles. *State v. Bailey*, 16 Ind. 46. But the court intimate that the directors, when in power, might have the right to receive, in good faith, payment of any subscription in real estate, if it appeared to be for the interest of the corporation to receive such payment in the given case. *Ib.*

¹⁶ *Force v. Tanning & Leather Co.*, 22 Ga. 86. See also *Robinson v. Beall*, 26 Ga. 17. And a shareholder who has been compelled to pay the debts of the corporation subsequently to proceedings in insolvency, cannot avail himself of such payment in defence of an action against him by the assignee of the corporation to recover a debt due from him to the corporation. *Howe v. Snow*, 3 Allen, 111.

¹⁷ *Patterson v. Wyomissing Manufacturing Co.*, 40 Penn. St. 117.

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assert his own claim, and it cannot be urged by the mortgagor on his behalf unless by his express procurement.¹⁸ The judgment against the corporation may be evidence against a shareholder, who is made responsible in default of the company, to show, *prima facie*, such default by judgment, execution, and return of *nulla bona*.¹⁹

SECTION IV.

Assignments by Railways in contemplation of Insolvency.

§ 245. General assignments of property by business corporations, for the benefit of creditors, giving preferences among them, but providing for the payment of all their debts before any return to the company, have been held valid.¹ But such an assignment by a railway company was held void under the insolvent laws of New York.²

¹⁸ *Boyd v. Chesapeake & Ohio Canal Co.*, 17 Md. 195.

¹⁹ *Hudson v. Carman*, 41 Me. 84. But such judgment would not be evidence against a shareholder whose liability was concurrent with that of the company.

¹ *Warner v. Mower*, 11 Vt. 385; s. c. 1 Redf. Am. Railw. Cas. 78; *Whitwell v. Warner*, 20 Vt. 444, 445; s. c. 2 Redf. Am. Railw. Cas. 340; *Angell & Ames Corp.* § 191, and notes; 3 Wend. 13; 3 Barb. Ch. 119; 16 Barb. 280; 21 Barb. 221.

² *Bowen v. Lease*, 5 Hill, 221. But where no preferences are made, it is valid; but the franchise of the corporation does not pass. *Hurlburt v. Carter*, 21 Barb. 221. See also *Fellows v. Commercial & Railway Bank*, 6 Rob. La. 246; *De Ruyter v. St. Peter's Church*, 3 Comst. 238. But see *Loring v. United States Vulcanized Gutta Percha Co.*, 36 Barb. 529. This subject is very extensively discussed in the case of *Curtis v. Leavitt*, 15 N. Y. 9, in regard to the North American Trust & Banking Co. Most of the points ruled are more or less affected by statutory provisions; but some may be of general interest.

* A receiver cannot be appointed to take charge of the effects of a corporation unless upon a bill to which the company is a party or consenting by formal appearance in court. *Gravenstene's Appeal*, 49 Penn. St. 310. See *Sands v. Boutwell*, 26 N. Y. 233; *Dayton v. Borst*, 4 Bosw. 115, where the conclusiveness of an adjudication of the insolvency of a corporation, made without notice to any officer of the corporation, is discussed, and under the circumstances of the case maintained. See *Nichols v. Perry Patent Arm Co.*, 3 Stock. Ch. 126.

In Louisiana, a corporation, created under the act for the organization of

corporations for works of public improvement and utility, cannot avail itself of the provisions of the act relative to the involuntary surrender of property. *Jeffries v. Belleville Iron Works Co.*, 15 La. An. 19. See *Bank Commissioners v. Rhode Island Central Bank*, 5 R. I. 12. The subject is discussed at length in *Murray v. Vanderbilt*, 39 Barb. 140, in which some of the points decided may be worthy of mention. It is here held that no power can be exercised by the Supreme Court of New York over a foreign corporation, in proceedings instituted by a stockholder to wind up its affairs; but for the purpose of preserving the property of such corporation, for the benefit of creditors or stockholders, a court of equity has ample power to take charge of it, and appoint a receiver. An appearance of the corporation by officers of the court will be valid and give jurisdiction, whether the service of process on its officers be good or not, provided the corporation is still in existence. *Murray v. Vanderbilt*, *supra*.

Where the president and secretary of a corporation executed an assignment of its property, and attached the seal of the company thereto, without any specific authority to do so, this was held not a proper execution of the instrument. And that the want of authority on the part of the officers could not be cured by any proof of execution before the commissioner. *Ib.*

In Pennsylvania, by statute of January 21, 1848, it was provided that no public internal improvement company should make an assignment, &c., of its real or personal property, while debts or liabilities to contractors, workmen, or laborers remain unpaid, without first obtaining their written assent. As to the assignment contemplated by this statute, see *McBroom's Appeal*, 49 Penn. St. 92. A natural person will acquire no right to exercise the franchises of a railway company, by means of an assignment of such powers by the company, without legislative permission; and if he attempt to construct the road under such assignment, a court of equity will restrain him at the suit of property owners affected thereby. *Stewart's Appeal*, 56 Penn. St. 418.

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PART XIV.

**THE LAW OF OTHER MATTERS PERTAINING
TO RAILWAYS.**

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*CHAPTER XXXVI.

BOARD OF TRADE. — RAILWAY COMMISSIONERS.

SECTION I.

Supervision of Railway Legislation.

§ 246. It is well known that from the first existence of railways operated by steam in England, the Board of Trade, which is a department of the executive government, have (except from 1846 to 1851, when their jurisdiction over railways was transferred to the Railway Commissioners, a distinct board created for that purpose) exercised a very extensive and very important control over the railway management in that country. This at one time extended to the supervision of all applications to parliament for legislation upon that subject, and resulted in the almost entire control of the railway legislation. As stated before, this jurisdiction was conferred upon a distinct board, denominated Railway Commissioners, from 1846 to 1851.¹ But in 1853 the report of the select committee of the House of Commons, upon the subject of railways, recommended that the supervision of railway legislation be referred in future to a permanent standing committee in the House of Commons, who, with the aid always attainable from the executive government, would prove a more satisfactory tribunal for the supervision of this subject than the Board of Trade. This proposition was adopted, and seems to have met with accept-

¹ Statutes 9 & 10 Vict. c. 105; 14 & 15 Vict. c. 105.

ance. The Board of Trade still present, at the beginning of each session of parliament, a comprehensive report upon the general nature of the railway schemes for the year, and detailed reports upon the provisions contained in the several bills, which are required to be furnished the board in advance of the meeting of parliament. A somewhat similar duty is, in many of the American states, performed by Railway * Commissioners. And such a board, if properly constituted, can scarcely fail to be of very essential service to the legislatures of the several states, whose sessions are short, and whose members are often inexperienced in the detail of general legislation requisite for the proper management of railways and unfamiliar with the devices sometimes resorted to for the purpose of gaining unequal and unjust special legislation in behalf of interested individuals or corporations. But the benefit of such a board must depend chiefly upon its intelligence and independence. Without these it might become an instrument of wrong and injustice, more effective, perhaps, than an ordinary legislative committee.

SECTION II.

Supervision of Railways by Board of Trade and Railway Commissioners.

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| 1. Supervision of the opening of railways in England.
2. Supervision of railway connections.
3. Supervision of the connection of branch railways by adjoining proprietors. | 4. Equity will not interfere with decisions of Commissioners.
5. English courts regulate railways for public accommodation.
6. Desirableness of railway commissions in this country. |
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§ 247. 1. In England, no railway or any portion of it can be opened for the public conveyance of passengers, until upon proper notice from the company it has been inspected and approved by the Board of Trade.¹ And if the officer inspecting the proposed railway shall report that it is not in proper condition to be used with perfect safety to the public, the Board of Trade may, from time to time, postpone the opening, not more than one month at one time, until it shall appear that such opening may take place

¹ Statute 5 & 6 Vict. c. 55; Hodges Railw. 547, 554.

without danger to the public.² And railways are subjected to severe penalties for opening their roads without the proper order of the board. For the purpose of enabling the board to perform their duties, they have power at all * times to enter upon railways and examine their works, and the companies' officers are subjected to penalties for wilfully obstructing an officer of the board in the discharge of such duty.

2. And the board have authority to determine all questions in dispute between different railways, in regard to their connections, so far as such questions relate to the safety or convenience of the public, and to determine by whom the expenses attending the arrangements shall be borne.³

3. The Board of Trade have power also to determine in what mode land-owners adjoining railways, having the right to connect branch railways with the main track of an existing railway, shall

² And it is said, that, although the board may have sanctioned the opening of one line of railway, they have authority to prohibit the use of an additional line. *Attorney-General v. Oxford & Wolverhampton Railway Co.*, 2 W. R. 330. And the Board of Trade may originate prosecutions for violations of their orders. *Hodges Railw.* 554.

³ Statutes 5 & 6 Vict. c. 55, §§ 5, 6, 11; 3 & 4 Vict. c. 97, §§ 5, 6; 7 & 8 Vict. c. 85, § 15. And where, by act of Parliament, disputes between three different lines of railway meeting at one point, in regard to the mode in which they should forward the traffic coming from each other's lines, were to be settled by arbitration, on the application of either party, on fourteen days' notice, the arbitrators to have power to direct all measures necessary for accomplishing the desired object, it was held to come within the range of the powers of the arbitrators to determine what trains should be run, and the speed at which they should run, and the places of stopping, and that one company should carry the cars and carriages of the others over their own line, and that it was not indispensable that the arbitrators should fix the time for the continuance of their regulations, as either party might compel a new arbitration, at any time, by fourteen days' notice. *Eastern Union Railway Co. v. Eastern Counties Railway Co.*, 2 Ellis & B. 530; s. c. 22 Eng. L. & Eq. 225. And a court of equity will interfere between two railways, entitled to the joint use of a station, by prescribing regulations for its management, but such interference ought not to take place without grave occasion. The court may also direct a partition of the station, and appoint a receiver if necessary. But where provisions exist for the settlement of such disputes by arbitration, the court will withhold its interposition until that remedy has been resorted to. Railway connections under the statute imply such a union of the tracks as will admit of the convenient interchange of freight and passengers. This may be effected between roads of different gauge. *Philadelphia & Erie Railroad Co. v. Catawissa Railroad Co.*, 53 Penn. St. 20.

be allowed to exercise the same consistently with the rights of the company and the safety of the public. And where railways cross highways or turnpikes, private ways or tramways, on a level, and the railway is willing to carry such way over or under their railway, by means of a bridge or arch, at their own expense, if, on the application of the company and a hearing of the parties, it shall appear that the level crossing endangers the public safety and that the proposal of the company does not violate existing rights without adequate compensation, the board may give the company power to build a bridge or make such other arrangements as the nature of the case shall require.⁴

* 4. But in a case before the Lord Justices upon appeal, it was held, affirming the decision of STUART, V.-C., that the Court of Chancery had no power to review the decision of the Railway Commissioners, whose office was not that of mere arbitrators, but *quasi* judicial.⁵

5. And the courts of equity,⁶ or, by the later statutes, the courts of law, have jurisdiction to determine questions touching public accommodation, as affected by imperfect railway connections. But they decline to interfere where there is every reasonable accommodation afforded, and there is no general complaint, although a single person claims further facilities by means of different arrangements.⁷

6. Our own views in regard to the desirableness and efficiency of Railway Commissioners in this country are presented somewhat in detail in a report to the legislature of the Commonwealth of Massachusetts, in the year 1865. (a)

⁴ Statute 5 & 6 Vict. c. 55, § 13; *supra*, § 108.

⁵ *Newry & Enniskillen Railroad Co. v. Ulster Railway Co.*, 2 Jur. n. s. 60; s. c. 39 Eng. Law & Eq. 553.

⁶ Statute 17 & 18 Vict. c. 21.

⁷ *Barrett v. Great Northern Railway Co.*, 1 C. B. n. s. 423; 28 Law T. 254; s. c. 38 Eng. L. & Eq. 218.

(a) Since this date commissions have been set up in many if not all the states, with functions so various, and in some cases so vague, as hardly to admit of adequate statement in the space here available. Suffice it to say that the need of state supervision of railways has been thereby in some sort met. That such supervision, in general, might be more orderly, more active, and far more strict, however, with great and obvious gain not less to the companies than to the public, is not open to question.

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*SECTION III.

Returns to the Board of Trade or Railway Commissioners.

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| 1. Board may require companies to make returns as to traffic, accidents, &c.
2. Supervision of third-class trains and mail trains. | 3. Extension of time for completing roads. |
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§ 248. 1. The Board of Trade in England have by statute power to require railways to make certain returns to them, upon subjects * connected with the public interests, such as the aggregate traffic in cattle and goods respectively, and also in passengers, according * to the several classes, the accidents occurring attended with personal injury, and in some cases such as are not.

2. The railway companies in England are required to convey passengers by third-class trains, at certain specified rates, and these trains, being intended for the public benefit and to prevent exorbitant demands of fare, are under the control of the board. The speed of mail trains, within certain limits, is under the control of the board.¹

3. The board have power, too, to extend the time for completing railways, fixed by their special acts, and for the compulsory powers of taking land in certain cases, or to allow the abandonment of railways or certain parts thereof, which are found not sufficiently remunerative to justify their continued operation.²

¹ Hodges Railw. 557, 558.

² Hodges Railw. 559, 560.
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* CHAPTER XXXVII.

LEGISLATIVE SUPERVISION. — POLICE OF RAILWAYS.

SECTION I.

Obligations and Restrictions imposed by Statute.

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| 1. Need and advantages of legislative control.
2. Provisions of English statutes in regard to traffic. | 3. Regulation of gauge. Right of public to use railway. |
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§ 249. 1. WE have said something upon the subject of the power of the legislature to impose new obligations and restrictions upon existing railways.¹ We now propose to speak briefly upon the subject as applicable to railways generally. Railways being a species of highway, and in practice monopolizing the entire traffic, both of travel and transportation in the country, it is just and necessary, and indispensable to the public security, that a strict legislative control should be constantly exercised. The difficulty is in knowing how to frame and how to exercise this control.²

2. The English statutes, and especially the Railway and Canal Traffic Act of 1854,³ have attempted a very strict supervision. By section one, the word "traffic" is defined to include, not only passengers and their baggage, and goods, animals, and other things conveyed by a railway or canal company, but also carriages and vehicles of every description used on such railway or canal. Section two requires such companies to use all people alike in regard to the traffic, to facilitate travel and transportation upon connecting lines to the utmost of their power, and to give * every facility to the public who wish to use such railway or

¹ *Supra*, § 232.

² See *Great Western Railway Co. v. Decatur*, 33 Ill. 381; *State v. Noyes*, 47 Me. 189; *State v. Jersey City*, 29 N. J. Law, 170; *Branson v. Philadelphia*, 47 Penn. St. 329.

³ Statute 17 & 18 Vict. c. 31.

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canal. Section three provides that any party claiming to have suffered injury in England in violation of the act, may make a summary application to the Court of Common Pleas, in Westminster Hall, or any judge of such court, stating in general terms the nature of the grievance, who shall issue process to such company and try the accusation in the most summary mode, and after ascertaining the true state of the facts, by the aid of engineers, barristers, or other fit persons, are to give judgment, and carry the same into effect by means of an injunction, mandatory or prohibitory, as the case may be. This remedy is merely cumulative, and does not deprive the party of any redress to which he was entitled before, or in any other mode.

3. The English statutes provide that unless by special grant the gauge of railways shall be uniformly four feet eight inches throughout Great Britain, and five feet three inches in Ireland.⁴ The Railways Clauses Consolidation Act provides in detail for the use of railways by all persons who may choose to put carriages thereon, upon the payment of the tolls demandable, subject to the provisions of the statute⁵ and the regulations of the company. The view originally taken of railways in England evidently was to treat them as common highways, open to all who might choose to put carriages thereon.⁶ But in practice it is found necessary for the safety of the traffic that it should be exclusively under the control of the company, and hence no use is, in fact, made of the railway by others.⁷

⁴ Statute 9 & 10 Vict. c. 57.

⁵ Statute 5 & 6 Vict. c. 55.

⁶ *King v. Severn & Wye Railway Co.*, 2 B. & Ald. 646, where the Court of King's Bench, by writ of mandamus, compelled a railway company, which was about to take up the rails on its road, to restore them, and to keep the road in a proper state for the public use. *Queen v. Grand Junction Railway Co.*, 4 Q. B. 18, 88.

⁷ *Queen v. London & Southwestern Railway Co.*, 1 Q. B. 558.

*SECTION II.

Municipal Regulation of the running of Trains.

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| <ol style="list-style-type: none"> 1. Municipalities may prohibit the use of steam motors in streets. 2. This by virtue of their general police power. 8. Police control during construction of railways in England. 4. Right of municipalities to grant the use of streets to companies having no charter. 5. Grant to street railway on condition | <ol style="list-style-type: none"> of municipal approval, disapproval fatal. 6. Municipal authorities cannot give permission to lay rails in the public street so as to create a public nuisance. 7. Municipal authority may regulate the removal of snow from street railways, by delegation to other officers. |
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§ 250. 1. It has been held, that a statute giving power to the common council of a city to regulate the running of cars within the corporate limits, authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city.¹ (a)

¹ *Buffalo & Niagara Falls Railroad Co. v. Buffalo*, 5 Hill N.Y. 209. See also *Veazie v. Mayo*, 45 Me. 560; *State v. Tupper*, Dud. S. C. 135. See *Branson v. Philadelphia*, 47 Penn. St. 329. And where a charter was granted to a company to build and use a passenger railway in certain streets of a city, subject to all the ordinances of the city council, the company, by accepting the charter, agreed to obtain the consent of the council, agreeably to ordinance. *Philadelphia v. Lombard & South St. Passenger Railroad Co.*, 3 Grant Pa. 403. In *Great Western Railway Co. v. Decatur*, 33 Ill. 381, an ordinance of the city of Decatur, prohibiting railway companies from allowing their engines, machines, or cars to stand or remain on a travelled railway crossing, used by teams, to the hindrance and detention of the same, was held good, and within the powers of the municipality. In *State v. Jersey City*, 29 N. J. Law, 170, it was held, that a power to regulate the speed of trains does not authorize a

(a) And a charter giving the trustees of a town supervision of streets and power to define and prevent or abate nuisances justifies an ordinance prohibiting the use of steam as a motor in the streets, there being no legislative grant authorizing such use. *North Chicago City Railway Co. v. Lake View*, 105 Ill. 207. But though in general a city has power to regulate the use of its streets, the legislature

may authorize the construction of a railway therein even though the city oppose it. *Harrisburg v. Harrisburg Passenger Railway Co.*, 1 Pearson, 298. Where, however, a city has full power by ordinance over its streets, a company accepting a charter with knowledge thereof takes subject to a proper exercise of such power by the city. *West Philadelphia Railway Co. v. Philadelphia*, 10 Phila. 70.

* 2. We should entertain no doubt of the right of the municipal authorities of a city or large town to adopt such an ordinance, without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions.² Such must have been the opinion of the court in

municipality to declare the running of any locomotive or train of cars in the city at a faster rate than a mile in six minutes, or the stopping of a train of cars on the track of a railway authorized by law, where the track does not cross a public street or square, a removable nuisance.

By the act incorporating the New York & Harlem Railroad Co., it was provided that nothing contained therein should authorize the construction of its tracks in or along any of the streets of the city of New York, without the consent of the mayor, &c., who were thereby authorized to grant permission so to construct it or to prohibit its construction, and, if constructed, to regulate the time and manner of running trains. Thereupon, on the application of the company, an ordinance was adopted by the mayor, &c., permitting the track to be laid in certain streets, but providing, that if, after its construction, it should in the opinion of the mayor, &c., constitute an obstruction or impediment to the future regulations of the city, or to the ordinary use of any street or avenue, the company should forthwith provide a satisfactory remedy therefor, or remove the rails; and also expressly reserving to the mayor, &c., the right to prescribe the moving power to be used, and the speed, as well as all other power reserved in the act of incorporation. The ordinance was to have no force until the company in writing under seal covenanted to abide by and perform its conditions. An agreement of this nature was executed and filed in the office of the city comptroller, and thereupon the company laid its track on Fourth Avenue and other streets. In 1854, the mayor, &c., prohibited the running of steam-engines or locomotives on the track of the company on part of Fourth Avenue in eighteen months after that time. It was held that this ordinance was valid, and not a violation of any of the franchises granted to the railway company; that granting permission to lay the track did not deprive the mayor, &c., of the right afterwards to regulate its use by the company; that the agreement of the company was valid as a restriction on its corporate power, and in no sense a transfer of it; that the corporation could make no valid contract interfering with its legislative control over the streets, and any such contract, if made, is revocable at its pleasure. The court say that a party calling for the use of its equitable powers will not be permitted to found his claim on a permission in a contract, while he repudiates the conditions on which that permission was granted. *New York & Harlem Railroad Co. v. New York*, 1 Hilton, 562.

² But a municipality cannot authorize a private corporation to create a nuisance in the course of its business, so as to exempt such corporation from liability to any citizen whose property has been injured by such nuisance. *Gas Co. v. Teel*, 20 Ind. 131. And, without legislative authority, a municipality cannot forfeit property as a penalty for a breach of an ordinance. *Phillips v. Allen*, 41 Penn. St. 481.

the case last referred to.³ NELSON, C. J., says, "A train of cars impelled by the force of steam through a populous city, may expose the inhabitants and all who resort thither for business or pleasure to unreasonable perils; so much so, that unless conducted with more than human watchfulness, the running of the cars [in that mode] may well be regarded as a public nuisance."⁴

3. By general statute, in England, railway companies are to bear the expense of a reasonable police force, during their construction, * and as long as workmen are employed in completing any works on or connected with the railway.⁵

4. An important case⁶ occurred in the city of New York, in regard to the power of the Common Council to grant the use of

³ Buffalo & Niagara Falls Railroad Co. v. Buffalo, 5 Hill N. Y. 209.

⁴ See also Commonwealth v. Old Colony & Fall River Railroad Co., 14 Gray, 93.

⁵ North British Railway Co. v. Horne, 5 Railw. Cas. 231. In this, and in some other cases, the provision is contained in the special act.

⁶ Attorney-General v. New York, 3 Duer, 119. The general doctrine of this case, as to the right of the city to make such grants, was affirmed in the Court of Appeals. Davis v. New York, 14 N. Y. 506. But in the Court of Appeals it was held that taxpayers and residents, unless owning land on that street and therefore specially injured by the grant, could not take proceedings for vacating it, and that the Attorney-General was improperly joined, and for further reasons the proceedings were in form irregular. It is here declared by Denio, C. J., that an unauthorized continuous obstruction of a public highway or a street is a public nuisance. But that which is authorized by competent legal authority cannot, in law, constitute a nuisance. See *supra*, § 1, pl. 4 and note. But see Terre Haute Gas Co. v. Teel, 20 Ind. 131.

And in New York & Harlem Railroad Co. v. New York, 1 Hilton, 562, it was held that the only limitation of the legislative power and control of the corporation of New York city over the streets within its limits, was that they should be appropriated to no use or burden not alike free and common to all travellers; that that power could not be surrendered, either in whole or in part, into any hands whatever without previous legislative sanction. It seems that converting the streets into the track of a railway, or permitting rails to be laid on them and used by individuals or an association for carrying passengers or merchandise for hire, is devoting them to an exclusive use, and cannot be permitted without the express sanction of the legislature. And although the power to grant this permission must be derived from the legislature, yet the corporation, by exercising it, is not deprived of its control over the streets in all other respects; and it may, in the grant, impose such conditions respecting the manner in which the rails shall be used, and on which the future use thereof shall depend, as it may think proper.

the streets to natural persons having no legislative grant for that purpose, for a railway for the transportation of passengers by horse-power. The case was an application to the Superior Court for an injunction against the defendants, to restrain them from making the grant. The defendants having in the first instance disregarded the preliminary injunction, and passed the grant, which was accepted in writing by the grantees, the grantees were also made parties defendants. Held "that a grant of the powers, privileges, and immunities conferred by the resolution in question, is the grant of a franchise, and if the municipal corporation of this city was incompetent *to make the grant, the making of it was an usurpation of power which can lawfully be exercised by the legislature of the state only; that neither of the city charters, nor any statute of the state, confers power in express terms to make such a grant. That the existence of such a power cannot be implied as being necessary to the exercise of any power expressly granted, or the performance of any duty enjoined by law; that no corporation, municipal or otherwise, possesses any powers except such as have been granted to it; that the resolution in question, when duly passed by the common council, and accepted by the grantees in the mode it prescribed, was not a law or ordinance repealable at the pleasure of the corporation; but a contract within the meaning of that clause of the constitution of the United States which prohibits every state legislature from passing any law impairing the obligation of contracts; that after being passed and accepted, so long as its conditions should be complied with, there being no power reserved in it to rescind or modify it, the corporation, if legally competent to pass it, would be incompetent to repeal it at its mere will and pleasure, so as to divest any rights of property acquired by the grantees under it; that the legislative power of a corporation is restricted by the constitutional and statute law of the state in which it is located, and that no state can grant to a corporation power to do that which the constitution of the United States prohibits it from doing itself; that the municipal corporation of this city cannot divest itself of nor abridge its legislative discretion and duty to alter and regulate the streets, as it may deem the public good requires. Nor can it prohibit such use of the streets by its inhabitants as is granted by a law of the state to every citizen as a matter of strict right.

“That the resolution in question is void, on the grounds: 1. That it grants a franchise, which the common council has no authority to grant. 2. The grant, by the meaning and legal import of its terms, may be perpetual. 3. The grant, in judgment of law, is a contract between the * corporation and the grantees, and in its legal import restricts the corporation in the future exercise of its legislative powers. 4. It confers upon the grantees and their associates exclusive privileges to a partial use of Broadway, which may be of perpetual duration. 5. It absolves them from an obligation imposed on them by a statute of the state. (2 Rev. Stats. 424, § 198.) 6. It confers rights, and exempts the associates from consequences in the event of the death of one of their number, repugnant to and in conflict with the settled law of the state. 7. It authorizes the grantees and their associates, however small may be their number, to become incorporated at any time under the General Railroad Act, although the road may have been previously constructed, while the act itself does not allow an incorporation after a road shall have been built, nor of a less number than twenty-five persons. 8. The grant and its acceptance constitute a contract, which the common council is prohibited from making, by the amended charter of 1849. 9. The making of a grant by a municipal corporation, conferring such privileges and immunities without lawful authority, being a usurpation of power and the illegal exercise of a franchise, may be enjoined by any court having jurisdiction of the subject-matter and of the necessary parties.”

And although some of the judges in the court of appeals intimate an opinion that it is competent for the municipal authorities of the city to grant a right to construct a railway in the streets of the city, provided it be not a franchise or monopoly and be equally open to all the citizens, the court held, that they have not power to grant the franchise for a railway.⁷ This may be true in the abstract. For the public authorities may doubtless lay down rails in the highways or streets, and allow all who choose to travel upon them with their own cars or carriages. And this must be substantially

⁷ But it is held in Louisiana, that the city of New Orleans has the power to sell the right of way in the streets to private individuals for a specified time, with a privilege of laying tracks and running horse-cars over them, according to a tariff to be fixed by the common council. *Brown v. Duplessis*, 14 La. An. 842.

what is here indicated, we apprehend. But no such grant was here intended. And practically no one would accept any such grant. *The decision must, therefore, as to the law, be regarded as virtually affirmed.⁸

5. When a city passenger-railway was incorporated by the legislature, upon condition that the consent of the city councils to use and occupy the streets should be obtained before the company should construct their track; and the city councils, by ordinance, declared their disapproval of the act, and declined to allow the streets to be so used; it was held that the grant thereby became inoperative, and that no subsequent consent of the city councils would give it effect.⁹

6. The question of laying rails upon the public street in order to facilitate the transportation of passengers by means of railway cars, by permission of the municipal authorities and without legislative grant, was extensively discussed in the Court of Queen's

⁸ In *Cambridge v. Cambridge Railroad Co.*, 10 Allen, 50, the court held, that a provision in the charter of a street-railway company, that at any time after ten years from the opening of any part of the road for use, a city may purchase of the company so much of its corporate property as lies within the limits of such city, at a specified price, does not give to the city any such interest or right as to enable it to maintain a bill in equity to restrain the corporation from raising passenger fares on its road, in violation of conditions expressly assented to by the corporation, and imposed by the mayor and aldermen of the city, when granting to the company the power to define and build a new line of railway through additional streets, if guilty of no fraudulent intent to destroy or depreciate the value of the corporate property, although the value of the franchise and property will be thereby diminished, and the portion of the railway constructed under such authority will perhaps be exposed to forfeiture. In *Branson v. Philadelphia*, 47 Penn. St. 329, it was held that, in respect to the care, regulation, and control of the highways within its corporate limits, the city of Philadelphia exercised a portion of the public right of eminent domain, subject only to the higher control of the state and the use of the people; and therefore a written license, granted by the city for a valuable consideration, authorizing the holder to connect his property with the city railway by a turnout and track, is not such a contract as will prevent the city from abandoning or removing said railway, whenever, in the opinion of its authorities, such action will tend to the benefit of its police.

⁹ *Musser v. Fairmount & Arch Street Railroad Co.*, 7 Am. Law Reg. 284. The case is put on the ground that the act was made dependent on the election of the municipal authority, and that election being exercised determined the right.

Bench, in the somewhat noted case of *Regina v. Train and others*,¹⁰ * where the following propositions are maintained: That the laying down of a railway in a public street, by permission of the municipal * authorities, causing an obstruction to travel and dangerous to passengers, and without legislative authority, is a public nuisance, and cannot be justified or excused by proof that the railway was used by a great number of passengers, and that it afforded a cheaper and easier mode of travelling than by the ordinary conveyances; nor can such railway be considered a species of pavement, which an unlimited discretion will justify the municipal authority in laying down.

. 7. Where the legislature give the mayor and aldermen of the cities, and the selectmen of the towns, the power to make regulations concerning the removal of snow from the tracks of street railways within the limits of such municipalities, it is competent for such municipal authorities, in the exercise of such power, to prohibit the removal of such snow at any and all times and places whenever, in their judgment, the public interest requires it. And it is no objection to the validity of an order upon that subject, that it allows of such removal of the snow from the tracks of a street railway only, where it is allowed, and in a manner to be designated by the superintendent of streets or other officer having control of the management and repair of the streets,¹¹ or highways.

¹⁰ 9 Cox C. C. 180; 3 Fost. & F. 22; 8 Jur. n. s. 1151. The leading opinion of the court, on the final hearing, in full bench, will be found interesting to the profession.

¹¹ *Union Railroad Co. v. Cambridge*, 11 Allen, 287.

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SECTION III.

Carrying Mails, Troops, and Munitions of War.

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| <p>1. In England this matter is controlled by parliament.</p> <p>2. In this country the division of sovereignty creates difficulty.</p> | <p>3. But it would seem that the state and national legislatures may control it.</p> <p>4, 5. Mail agents may maintain an action against company for injury.</p> |
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§ 251. 1. In England the sovereignty being one and indivisible, there is no doubt of the right to require the aid of the railways of the kingdom upon such terms as a disinterested umpire may adjudge reasonable, in the transportation of the mails, and of troops and munitions of war.¹

* 2. The subject is embarrassed in this country by the division of the sovereignty into state and national, such companies deriving all their corporate powers from the state. And the transportation of the mails, as well as troops and the munitions of war in time of peace, being exclusively a national interest, it has been sometimes supposed that the national government was altogether at the mercy of the railways in regard to this species of transportation, except that they might claim to pass upon the same terms as other passengers and freight. The matter of the transportation of troops in time of peace is one of small importance, and where no serious abuse is likely to intervene. And in time of war all the resources of the nation are, of course, subject to the control of the national government.

3. But the transportation of the mails is one of constant expenditure, and of vast importance in the aggregate. But as the matter has not been discussed in the judicial tribunals, either of the states or nation, we cannot pretend to shed much light upon it. It would seem wonderful if the legislatures of the states and of the nation have not the power to control the subject by general legislation to the same extent as the British parliament. And accordingly it will be found, that many of the states in their gen-

¹ Public baggage, stores, &c., sent in charge of troops, must be considered as the baggage of such troops, under the English statutes, and must be carried by a railway company at the rate specified in statute 7 & 8 Victoria, c. 85, § 12. Attorney-General v. Great Southern & Western Railroad Co., 14 Ir. Com. Law, 447.

eral railway acts have introduced provisions requiring the railways to transport the mails upon reasonable terms, and providing for an umpirage where the parties do not agree.

4. In England it has been held, that the officers of the post-office who are required to be in charge of the mail during its transportation, may have an action against the railway company transporting the same, for any injury sustained through their negligence, although there subsist no contract between the parties, and none in any form, except for the transportation of the mails, with the proper incidents connected therewith, and the injury was received while in the performance of their official duty, in charge of the mails.²

* 5. Almost precisely the same point was decided in a late

² Collett v. London & Northwestern Railway Co., 16 Q. B. 984; s. c. 6 Eng. L. & Eq. 305. Lord CAMPBELL, C. J., here says, "The duty does not arise from any contract with the plaintiff, but from the obligation imposed by the legislature upon the company to carry the mail-bags and the officers of the post-office in charge of the letters. If it be the duty of the company to carry the plaintiff at all, it must be their duty, in doing so, to use reasonable care and skill."

That the establishment and maintenance of public posts is an exclusive prerogative of national sovereignty, is a proposition admitting of no question. The history of the establishment of public posts for the conveying of public intelligence, and for other purposes connected with governmental administration, is curious. They are mentioned as having been established, in the Persian empire, as early as the time of Cyrus (Xen. Cyrop. lib. 8); and in Rome, in the time of Augustus (Suet. in Vit. Aug. c. 49). Plutarch, in his life of Galba, mentions, that the magistrates were obliged to furnish horses for this service, on proper requisition. And the younger Pliny, in writing the emperor Trajan, apologizes for having resorted to the use of the public post-chaises under his charge, for private purposes, in a case of painful emergency, the death of a near family relative; and where he desired to have his wife pay her condolence to the surviving members of the bereaved family, in the freshness of their grief. The emperor's reply is a model state paper, brief and pertinent. Book X., Letter 122, Pliny's Letters. Louis XI., it is said, first established public posts in France, in 1474; and it was not till the 12th of Charles II. that the post-office was established in England by act of Parliament.

The history of the subject shows, that the establishment of public posts has always been regarded as one of the rights pertaining to national sovereignty, and that the citizen, or subject, felt bound to lend all requisite aid in its accomplishment. That the sovereign should be at the mercy of the citizen, in this respect, involves the same inconsistency as that it should be so in regard to the other rights of eminent domain.

case³ (a) in New York, in regard to the United States mail agent, who was injured while on board the company's cars in the discharge of his official duties, in charge of the United States mail, there being no contract for carrying plaintiff except with the government, and in connection with carrying the mail. The decision of the court is expressed in the language of Lord CAMPBELL, C. J., in the case of *Collett v. London & Northwestern Railway*.⁴

³ *Nolton v. Western Railway Co.*, 10 How. Pr. 97.

⁴ 16 Q. B. 984; s. c. 6 Eng. L. & Eq. 305.

(a) The doctrine of this case is again affirmed in *Hammond v. Northeastern Railroad Co.*, 6 S. C. 130, where it is held that the liability of the company is founded not on contract but on the duty which the law imposes. See further, as to liability of the company, *Pennsylvania Railroad Co. v. Price*, 96 Penn. St. 256.

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*CHAPTER XXXVIII.

CONSOLIDATION OF COMPANIES.

SECTION I.

Power of the Legislature to consolidate Companies.

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| 1. Power of parliament unquestioned.
2. In this country consent of the shareholders is necessary. | 3. In England companies combine without legislative permission. |
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§ 252. 1. THERE seems to be no question made in England of the power of different railway companies, or railway and canal companies, to amalgamate or combine their interests and their stock by agreement, with the consent of parliament, under a special act.¹ This is every-day practice there, and seems to be a very useful and just mode of arranging the business of different lines, or the same continuous line often, where competition is liable to do harm both to the traffic and the shareholders. Some few questions, of no great importance, have already been decided upon this subject. In a case where two canals were combined with the grant of a railway, and the railway company were, by the special act, to pay the canal companies a specified price per share for all their shares, "from and immediately after the opening of the railway from A. to G. for public use;" the railway being so opened the whole length of the Grantham Canal, but

¹ Under a clause in the deed of settlement of a company, giving power to the directors to act in their discretion as they think for the interests of the company, *quære* whether they can purchase the business and take the assets and liabilities of another company; but where the shareholders have acquiesced in the amalgamation, and the dealings have been such that it is impossible to replace the companies in their original position, it is too late to disturb the arrangement. *In re Saxton Life Society*, 32 Law J. Ch. 206. And see s. c. 1 De G. J. & S. 29. But an amalgamation of railway companies cannot be effected without the consent of the legislature. *Clinch v. Financial Co.*, 17 W. R. 84. And it is here held that where the principal contract falls through defect of legislative authority, all accessory contracts will fall with it; s. c. Law Rep. 4 Ch. Ap. 117.

not the whole line, as specified in the act, the remaining portion being that which * competed with the Nottingham Canal; the Grantham Canal brought an action for the price of their shares. It was decided, in the court below, that no recovery could be had until the whole railway was opened for public use, according to the terms of the act.² But in the same case in the Exchequer Chamber,³ it was decided by a divided court, that the railway being opened, so far as competed with the G. canal, it was the fair import of the act, although containing no distributive words, that each canal company might recover its several interest, whenever the railway was fully opened, as to competition with their interests.

2. But in this country it seems to be regarded as indispensable, under the restriction in the United States Constitution, that the consent of all the shareholders to the amalgamation of different companies should be obtained.⁴ (a) But, except in the case * of

² *Grantham Canal Co. v. Ambergate, Nottingham & Boston & Eastern Junction Railway Co.*, 15 Jur. 991; s. c. 6 Eng. L. & Eq. 328.

³ 16 Jur. 946; s. c. 12 Eng. L. & Eq. 439. This seems to be a very just and reasonable decision, though not altogether consistent with the terms of the act. But it is a striking illustration of the strong inclination of the English courts, both of law and equity, to escape from merely verbal and technical obstructions to the attainment of full justice.

⁴ *Fisher v. Evansville & Crawfordsville Railroad Co.*, 7 Ind. 407. See also *Kean v. Johnson*, 1 Stock. Ch. 405-424, for an elaborate opinion on this subject, where the special master, sitting for the Chancellor, arrives at the conclusion, that the legislature has no power to consolidate different railway companies without the consent of all the shareholders, and, as the statute provides that nothing therein contained should affect "any right whatever," it should receive the construction, that the consolidation provided for should be effected in the only practicable mode known to the law which would not affect rights, i. e., by the consent of all the shareholders. *Chapman v. Mad River & Lake Erie Railroad Co.*, 6 Ohio St. 119. But it seems now to be considered that the public have such an interest in railways and canals, that

(a) Other than that there is nothing so or not depends on the legislative intent. *Central Railroad & Banking Co. v. Georgia*, 92 U. S. 665. Several of the states have now by general statutes provided for the consolidation of railway corporations. So in New York, so in Ohio, so also in Illinois.

unpaid subscriptions and analogous matters, the shortest acquiescence of the stockholders in the combination of different companies by act of the legislature, will be likely to be held by the courts as conclusive of their right to interfere.⁶

3. But it seems to be regarded in England as beyond the powers of railway companies to combine their interests and equalize their dividends without an enabling act of the legislature. And it was held, that a single shareholder was entitled to apply to a court of equity to restrain such an attempt. And it is competent for one shareholder to maintain a bill for an injunction

the legislature may provide for the consolidation of different lines, by the agency of a prescribed majority, and a provision for purchasing the stock of all dissentients at its value. *Black v. Delaware & Raritan Canal Co.*, 22 N. J. Eq. 130. Corporations "in this state or otherwise," was held to embrace those out of the state. The act of amalgamation is not void, but voidable at the election of shareholders. *McCray v. Junction Railroad Co.*, 9 Ind. 358. Stock subscriptions are thereby released. *Ib.* In *State v. Bailey*, 16 Ind. 46, it was held that corporations can consolidate only with the consent of the legislature; and when a consolidation is thus effected, it amounts to a surrender of the old charter, and the formation of a new corporation out of such portions of the old as enter into the new. And see *McMahan v. Morrison*, 16 Ind. 172. Where two railway companies, in an agreement for consolidation, inserted an article to provide for the completion and running of the route of one of the two companies, and the directors of the consolidated company failed to comply with the provisions of this article, it was held, that if the duty thus created was owing to all the stockholders, one of the stockholders could not sustain an action against the directors, to enforce a compliance therewith; and if the duty was owing to a class of stockholders having in the matter a right or interest distinct from the rest of the stockholders, any proceeding to obtain relief for a refusal or neglect of the directors to discharge that duty, must bring before the court not only the directors of the company, but the two classes of the stockholders. *Port Clinton Railroad Co. v. Cleveland & Toledo Railroad Co.*, 18 Ohio St. 544. Where two companies are amalgamated by agreement, the first company covenanting to indemnify and hold harmless the stockholders of the second company, only those members of the second company who have executed the agreement can claim specific performance of the contract of indemnity. *Anglo-Australian Insurance Co. v. British Provident Insurance Co.*, 8 Jur. N. S. 628.

⁶ *Chapman v. Mad River & Lake Erie Railroad Co.*, 6 Ohio St. 119. Two companies cannot consolidate their funds or form a partnership, unless authorized by express grant of the legislature, or necessary implication. *New York & Sharon Canal Co. v. Fulton Bank*, 7 Wend. 412. The majority of a corporation cannot bind the minority, by the acceptance of a fundamental alteration of its charter. *Supra*, § 56. See *Macon & Western Railroad Co. v. Parker*, 9 Ga. 377.

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tion restraining the company from doing an act beyond the range of the statutory powers conferred upon them.⁶ But a private individual is not entitled to move an injunction against a public company for exceeding their powers, unless he suffers some specific injury in consequence.⁷

SECTION II.

What amounts to a Consolidation.

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| 1. Mere association or alliance not sufficient. | 2. Agreement to consolidate from a day past. |
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§ 253. 1. It has been held that one railway company associating, allying, and connecting itself with another in regard to * traffic, in which they have a common interest, does not amount to an amalgamation between the two companies.¹ An amalgamation seems to imply such a consolidation of the companies as to reduce them to a common interest.

2. An agreement to amalgamate from a day past seems to be considered, in equity, as an actual amalgamation from that time. But an agreement to do so from a future time cannot amount to an amalgamation until the time arrive.¹

⁶ *Charlton v. Newcastle & Carlisle Railroad Co.*, 5 Jur. N. S. 1096.

⁷ *Ware v. Regent's Canal Co.*, 3 De G. & J. 212; s. c. 5 Jur. N. S. 25.

¹ *Shrewsbury & Birmingham Railway Co. v. Stour Valley Railway Co.*, 2 De G. M. & G. 866; s. c. 21 Eng. L. & Eq. 628; *Midland Great Western Railway Co. v. Leech*, 3 H. L. Cas. 872; s. c. 28 Eng. L. & Eq. 17.

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SECTION III.

Contracts made before Consolidation.—Subsequent Enforcement.

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| <ol style="list-style-type: none"> 1. Where the consolidation is legal, all prior contracts may be enforced. 2. But otherwise where any formalities are not complied with. 3. Admissions by the company contracting, good against consolidated company. 4. Consolidated company may apply funds to pay debts of former companies. | <ol style="list-style-type: none"> 5. Instance illustrating the right to amalgamate. 6. Validity of proceedings in insolvency after consolidation against one of the former corporations. 7. Mortgage of one of the companies for its own debt made after the consolidation valid. 8. Contract of company for arbitration, enforced after consolidation. |
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§ 254. 1. Where the amalgamation is strictly legal, and no impediment arises in regard to the form of the remedy, it would seem a contract, made before amalgamation, should be capable of being enforced after. (a) And where a clerk to a railway company had executed a bond, with surety, for the faithful discharge of his duty to one company, which was subsequently amalgamated by act of parliament with another railway company, saving to the consolidated company all remedies upon contracts to either, it was held an action will lie upon such bond.¹ So, too, * such bond is

¹ London, Brighton, & South Coast Railway Co. v. Goodwin, 3 Exch. 320; s. c. 6 Railw. Cas. 177. And the same point is so ruled in Eastern Union Railway Co. v. Cochrane, 9 Exch. 197; s. c. 24 Eng. L. & Eq. 495. In the

(a) It has accordingly been held that the new company is liable for the debts of the consolidated companies, without any provision therefor in the act by which the consolidation is effected. *Harrison v. Union Pacific Railroad Co.*, 13 Fed. Rep. 522; *Tyson v. Wabash Railway Co.*, 11 Bissell, 510. At least in equity and to the extent of the property received. *Harrison v. Arkansas Valley Railway Co.*, 4 McCrary, 264. See *Arbuckle v. Illinois Midland Railway Co.*, 81 Ill. 429. And where by the terms of consolidation the new company takes the property of the old ones and as-

sumes all their debts, it takes the property subject to the debts, and cannot be heard to aver ignorance of an unrecorded mortgage. *Mississippi Valley Co. v. Chicago, St. Louis, & New Orleans Railroad Co.*, 58 Miss. 846. Suits to enforce the debts of the old companies are properly brought against the new one in its new name. *Houston & Texas Central Railroad Co. v. Shirley*, 54 Tex. 125; *Columbus, Chicago, & Indiana Central Railway Co. v. Skidmore*, 69 Ill. 566; *Indiana Railroad Co. v. Fryer*, 56 Tex. 609.

good security to the new company for the faithful conduct of such clerk in the employ of such new company.²

2. But where the amalgamation is illegal calls cannot be enforced, or, if the provisions for the amalgamation had not been fully carried into effect, no suits for calls in the name of the new company can be sustained.³

3. And in an important case in the United States Supreme Court,⁴ it seems to have been held, that in an action against the amalgamated company, upon a contract for construction made by one of the consolidated companies, the admission or act of the company making the contract will bind the aggregate company by way of estoppel *in pais*.

4. And where a railway and canal company were formed by the union of several ancient canals and three railway companies, and power was given to the united companies to issue new shares for the purpose of raising capital, it was held no misapplication of the funds of the new company to apply them first to the payment of a large debt of one of the canal companies.⁵ (b)

former case the breach was committed before, and in the latter, after the amalgamation. And the same principle is applied to determine the liability of the companies, after consolidation, in *Gould v. Langdon*, 43 Penn. St. 365.

² *Eastern Union Railway Co. v. Cochrane*, 9 Exch. 197; s. c. 24 Eng. L. & Eq. 495. And see *Robertson v. Rockford*, 21 Ill. 451.

³ *Midland Great Western Railway Co. v. Leech*, 3 H. L. Cas. 872; s. c. 22 Eng. L. & Eq. 45; *supra*, § 56.

⁴ *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Howard*, 13 How. 307. And see *McMahan v. Morrison*, 16 Ind. 172.

⁵ *Cooper v. Shropshire Union Railway & Canal Co.*, 6 Railw. Cas. 136. The Richmond & Miami Railroad Co., which was created under the laws of Indiana, and owned a railway running from Richmond to the Ohio State Line, and the Eaton & Hamilton Railroad Co., which was created under the laws of Ohio, and owned a railway running from Eaton, Ohio, to the state line of Indiana, in the direction of Richmond, were, by virtue of laws of those states, consolidated into one company, called the Eaton & Hamilton Railroad Co. The law in neither state, in terms, surrendered to the other any jurisdiction over the property of the existing companies. Prior to the consolidation, the Indiana company issued sixty bonds, of one thousand dollars each, and executed a first mortgage on its road to secure payment thereof to a trustee, with interest payable semi-annually, and those bonds were also guaranteed by the Ohio company. Afterwards, but also prior to the consolidation, the same company issued forty additional bonds, each for the same amount as

(b) See *supra*, pl. 1, and note (a).

* 5. Where the preliminary contracts by which two railway companies were set on foot, each provided that the managing committees or directors might "demise or sell the undertaking, or any part thereof, or amalgamate the same or any part thereof *with any other railway* or railways, and the directors of the two companies made and carried into effect an amalgamation of the two companies, which necessarily interfered with each other's business, it was held that the amalgamation of these two companies came fairly within the preliminary contracts, and that an action for calls might be maintained against any shareholder in either company who had executed the preliminary contracts." ⁶

before, and made a second mortgage to the same trustee to secure their payment. By the articles of consolidation it was agreed that the companies should become united as one, under the name aforesaid; that the corporate name, franchise, &c., of the Eaton & Hamilton Company should be preserved and remain intact as if no consolidation had been made, except so far as modified by the enlarged interests of the company and the laws of Indiana; that all property and franchises of the Indiana company were thereby transferred to and merged in the Ohio company. and the organization and name of the former should cease; that the Ohio company should assume such property and franchises, and pay all the liabilities of the Indiana company. Prior to the consolidation, bonds had been issued by the Ohio company, which had been made liens on its road; and after the consolidation, bonds were issued and made a lien on the entire road. The holders of the first bonds issued by the Indiana company, sued to enforce payment of their bonds by a foreclosure of their mortgage, the trustee having refused to sell under the power therein contained. The suit was instituted against the Eaton & Hamilton Company, which appeared and defended and it was held, (1) that such consolidation at least effected a transfer of the property of the Indiana company to the Ohio company, and that the suit was therefore properly brought against the latter corporation; (2) that the Ohio company, having acquired property in the road in Indiana after the execution of the said two mortgages, took the same subject thereto; and that the holders of the first mortgage bonds had the right to enforce the payment thereof by proceedings for a foreclosure in the Indiana courts, and a sale of the property in Indiana; (3) that the power given in the first mortgage to sell the road in certain events, if it could be exercised at all, did not prevent the bondholders from asserting their rights by foreclosure, but was merely a cumulative remedy; (4) that the courts of Ohio would have no jurisdiction to enforce the foreclosure of said mortgage, and that neither the agreements nor the laws above referred to gave them such jurisdiction, if indeed it could in any way be given. *Eaton & Hamilton Railroad Co. v. Hunt*, 20 Ind. 457.

⁶ *Cork & Youghal Railroad Co. v. Patterson*, 18 C. B. 414. See *supra*, § 56, note 1.

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6. In a case⁷ before the highest court in the state of Connecticut, where the question arose in regard to proceedings in insolvency against one corporation, which by acts of different state legislatures had been consolidated with other companies in other states, considerable doubt is expressed in regard to the mode and the binding effect of such proceedings, and, although the proceeding * seems to have been recognized as regular and valid in that case, it is very obvious there must always exist serious embarrassment in bringing such proceedings to any satisfactory determination.

7. And it has been considered that one or two or more consolidated railway companies may each make a valid mortgage of its property for its own debts, even after the consolidation.⁸ Two or more companies entered into a joint contract for building a connecting railway, one of the parties to the contract to build the new road, the other parties contributing in a fixed proportion to the expense, the company owning the road to control it, and to pay over its net earnings to a trustee, who should distribute the same monthly among the contributing parties until their advances were reimbursed ; the road to be owned by all the companies in proportion to their contributions. Subsequently and before the road was built, another contract was made between the parties, by which it was agreed to run an express through train over the road, twice daily, for five years. The road was built, and the expenses contributed by the several companies, except a portion due from one of them, which was collected by suit. But in consequence of the insolvency of one of the companies, the arrangement for through trains failed, and the new road fell into decay. Subsequently, and after some years, the company which built the new road renewed it, and used it in connection with its own. Upon a bill in equity, brought by the purchaser of the insolvent company's road for an account of the earnings of the new road built by the contract, it was held that the contract for building the road and for running the through trains were distinct and independent of each other, and that the duty of the respondent company to apply the earnings of the new road to reimbursing the expense of building it, was not affected by the insolvency of one of the contracting parties and the failure of the through trains ; and a trustee and

⁷ *Platt v. New York & Boston Railroad Co.*, 26 Conn. 544.

⁸ *Wright v. Bundy*, 11 Ind. 398.

receiver of the earnings of the new road was appointed and an account ordered.⁹

8. And where a railway company entered into a contract, one of the terms of which was that the principal engineer, so long as he remained such, should be the arbitrator in all matters of * difference in regard to the contract, and that company was subsequently amalgamated with another company, and disputes having arisen in regard to the contract, it was held, that such person was still the proper arbitrator, he remaining in the same office.¹⁰

⁹ *Bartlett v. Norwich & Worcester Railroad Co.*, 33 Conn. 560.

¹⁰ *Wansbeck Railway Co. v. Trowsdale*, Law Rep. 1 C. P. 269; s. c. 12 Jur. n. s. 740. As to the powers and duties of the consolidated company, see *Fisher v. New York Central & Hudson River Railroad Co.*, 46 N. Y. 644.

* CHAPTER XXXIX.

MISCELLANEOUS MATTERS.

SECTION I.

Jurisdiction of the Federal Courts.

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| 1-5. Corporation a "citizen" of the state, and as such may sue and be sued in federal courts.
6. Service of process on authorized agent in another state. | n. 6. Corporation liable in England to process of foreign attachment.
7. Road extending through several states, corporation re-incorporated in other states, one throughout. |
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§ 255. 1. CONTRARY to the earlier decisions of the United States courts, it is now settled that a corporation is to be regarded as a "citizen" of the state where it exists, and as such may be sued, in that circuit, by a citizen of any other state.¹ (a)

2. And it makes no difference that the shareholders and members of the corporation reside in different states, as it is the artifi-

¹ *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. 314. Mr. Justice GRIER, in giving the opinion in this case, cites *Louisville, Cincinnati, and Charleston Railroad Co. v. Letson*, 2 How. 497, as having virtually decided the question, and as having been so regarded and recognized by the profession and the court. See also *Works v. Junction Railroad Co.*, 5 McLean, 425; *Culbertson v. Wabash Navigation Co.*, 4 McLean, 544. See also *Chicago & Northwestern Railway Co. v. Whitton*, 13 Wal. 270.

(a) And it may sue as a citizen as well as be sued. <i>Missouri, Kansas, & Texas Railway Co. v. Texas & St. Louis Railway Co.</i> , 10 Fed. Rep. 497. And in support of this general proposition, see further <i>Muller v. Dows</i> , 94 U. S. 444; <i>National Steamship Co. v. Tugman</i> , 106 U. S. 118; <i>Kansas Pacific Railroad Co. v. Atchison, Topeka, & Santa Fe Railroad Co.</i> , 112 U. S. 414.	As a consequence of this rule, it follows that an averment in the declaration that the plaintiff is a corporation created by the laws of two states implies a suit in which the plaintiffs are citizens of both states, so that a suit cannot be maintained in a circuit court for the district of one of those states against a citizen of that state. <i>Ohio & Mississippi Railroad Co. v. Wheeler</i> , 1 Black, 286.
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cial being created by the act of incorporation which is the party, and not the corporators.²

3. But a railway company cannot be said, either at law or in equity, to reside in a different district from the one where it exists and was chartered. Nor can a circuit court of the United States take cognizance of a controversy in one district or state where the subject-matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the locality of the controversy.³ This was the case of a railway *in Indiana entering into an agreement with a railway in Michigan to allow them to build and operate their road under their charter. Another railway company in Indiana, claiming that their rights were being infringed, filed a bill in equity in the United States District Court for the District of Michigan, to enjoin the company in that state, who were proceeding under the contract without making the other party to the contract a party to the bill. The Circuit Court upon hearing dismissed the bill, and the Supreme Court affirmed the decree. The Supreme Court held also that the other party to the agreement was a necessary party to the bill.

4. In a suit in Indiana, in the Circuit Court of the United States, between the same parties, it was held that a corporation is not amenable to process except in the state where its business is done.⁴ A corporation in Indiana cannot sue, in that state, a

² Louisville, Cincinnati, & Charleston Railroad Co. v. Letson, 2 How. 457. See also *supra*, § 20, and cases cited. But see Ohio & Mississippi Railroad Co. v. Wheeler, 1 Black, 286; Wheedon v. Camden & Amboy Railroad Co., 2 Phila. 23; s. c. 1 Grant Pa. 420.

³ Northern Indiana Railroad Co. v. Michigan Central Railroad Co., 15 How. 233. See Wheedon v. Camden & Amboy Railroad Co., 2 Phila. 23; s. c. 1 Grant Pa. 420. It is here held, that though a corporation is not *per se* a citizen within the meaning of the federal constitution, yet when sued, if its governing officers, who are the substantial parties, are citizens of the state which created the corporation, and the other party is a citizen of another state, the federal courts have jurisdiction, and the suit is removable under the judiciary act of 1789.

But a claim against a railway company for the loss of goods as a common carrier is a chose in action, and not assignable so as to enable the assignee to sue in the federal courts, unless the assignor could have sued in those courts. Ayres v. Western Railroad Co., 48 Barb. 132.

⁴ And see Ohio & Mississippi Railroad Co. v. Wheeler, 1 Black, 286. It is held in this case, that if all the members of a corporation are citizens of one

* corporation doing business in the state of Michigan. Where the subject is essentially local, the action must be brought in the state where the injury is done and the defendant resides.⁵

5. It has been held that an insurance company chartered by one state and having its principal place of business there, is to be regarded as a citizen of that state, for the purpose of maintaining suits or being sued in the circuit courts of the United States.⁴

6. But it was also held, in this case, that a judgment recovered against such company in another state, by service of process upon an agent of the company doing business there, on behalf of the company, and who was permitted so to transact such business by consent of the legislature of that state, upon condition that service of process upon such agent should be regarded as service upon the company, was a valid judgment, and entitled to the

state, it may maintain a suit in the federal courts against a citizen of another state; that the presumption is, that all the members of a corporation are citizens of the state which created it; and that no averment to the contrary will be heard for the purpose of withdrawing the suit from the jurisdiction of the court. But it is also held, that a corporation chartered in two states cannot have the same legal being in both; they are two separate corporations, and cannot unite to sue a citizen of either state. And the Supreme Court of Indiana lately held that a corporation, created by a special charter from the state of Indiana, in which the corporation is made to consist of certain directors and their successors, with power to construct a railway in said state, and in connection therewith to own and manage certain property in the state of Ohio, could not, by reason of such authority, change its domicile to the latter state. *Aspinwall v. Ohio & Mississippi Railroad Co.*, 20 Ind. 492. And see, as to foreign corporations, *Boley v. Ohio Life Insurance & Trust Co.*, 12 Ohio St. 139; *Sprague v. Hartford, Providence, & Fishkill Railroad Co.*, 5 R. I. 233. See, as to jurisdiction of state courts over matters pending in the federal courts, *Ohio & Mississippi Railroad Co. v. Fitch*, 20 Ind. 498. And a person suffering injury on the defendants' railway in New York may maintain an action for the same in the courts of New Jersey. *Ackerson v. Erie Railway Co.*, 31 N. J. 309.

⁵ *Northern Indiana Railroad Co. v. Michigan Central Railroad Co.*, 5 McLean, 444. See also *Woolsey v. Dodge*, 6 McLean, 142. The same general doctrine is somewhat elaborated in *Baltimore & Ohio Railroad Co. v. Glenn*, 28 Md. 287. It is here said that corporations can have no status away from the state of their creation; they cannot transfer themselves, at will, beyond the limits of that state. But they may enter into binding contracts, through the instrumentality of agents, in other states. *Augusta Bank v. Earle*, 13 Pet. 519; s. c. 1 Redf. Am. Railw. Cas. 45.

same consideration in the state where the company was located as in the state where rendered.⁶

7. In a case where the defendant, a railway corporation chartered by the state of Maryland, and having obtained a re-enactment of its charter by the state of Virginia, through a portion of which its road extended, and which had a branch extending through the District of Columbia, by authority of an act of Congress, the plaintiff having suffered injury upon that portion of the road lying within the state of Virginia, brought his suit in the District of Columbia; and it was held⁷ that the corporation was entire in both states and in the District of Columbia, — no new corporation having been created by the proceedings after its original charter, but only a permission obtained for the old one to exercise its functions beyond the limits of the state of Maryland. And it was also held that it made no difference that the plaintiff was riding upon a ticket issued in coupons for the different states, and specially restricting the responsibility for the safety of persons or baggage to the proprietors of the portion where loss or damage occurred.(b)

⁶ *Lafayette Insurance Co. v. French*, 18 How. 404. In a recent case before the House of Lords, the question was determined that an English railway company may be sued in Scotland by process of foreign attachment. *London & Northwestern Railway Co. v. Lindsay*, 3 Macq. Ap. Cas. 99; s. c. 30 Law T. 357. But this question is influenced by the proverbial readiness of the Scottish courts to take jurisdiction of parties domiciled abroad, through the operation of the process of foreign attachment. That seems to be one of the peculiar and long-standing infirmities of the Scottish courts. And with all due submission, it seems that in regard to *ex parte* divorces, and some other matters, the American courts have adopted the practice of the Scottish courts, without much consideration; partly, perhaps, because they seemed convenient for the emergency, and partly too, possibly, because we derive so much that is good, and so little that is not, from that excellent country.

⁷ *Baltimore & Ohio Railroad Co. v. Harris*, 12 Wal. 65.

(b) A corporation owning a road extending through several states, is for most purposes a single corporation, though made up of several, where the several are merged in one under the laws of the several states, and where there are a common stock, a single organization, a single set of officers, &c. *Graham v. Boston, Hartford, & Erie Railroad Co.*, 14 Fed. Rep. 753. But see *Missouri, Kansas, & Texas Railway Co. v. Texas & St. Louis Railway Co.*, 10 Fed. Rep. 497, where it is held that subsequent acts of incorporation by other states are to be construed as mere licenses, enlarging the field of operations of the corporation, but not constituting it a corporation of the other states.

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SECTION II.

Liability for doing an Act prohibited by the Company's Charter, without Special Damage to the Party interested.

§ 256. Where the owner of a ferry across the river Mersey was protected in his rights by a section in the special act of a * railway prohibiting the company from extending their road across the river until certain other works were finished, it was held that he might maintain an action against the railway company for violating such provisions of their act, which were obviously inserted for his protection only, and not with any reference to the public interests, without showing the special damage he had thereby sustained.¹

SECTION III.

Mode of reckoning Time.

Difference between that of England and America.

§ 257. By the English statute twenty-one days are allowed the shareholders, after notice of the making of calls, in which to make payment. This means twenty-one clear days, exclusive of the first and last days.¹ But it is questionable whether the same construction would be applied to a similar provision in this country, unless the terms of the statute were very explicit in that direction. The more common mode in this country, in reckoning time specified in a statute, is to exclude the day from which the period is reckoned, and to include the day of its accomplishment.²

SECTION IV.

Service of Process on Companies.

§ 258. Where a statute provided that, unless the company designated some agent within certain precincts, upon whom ser-

¹ *Chamberlaine v. Chester & Birkenhead Railway Co.*, 1 Exch. 870.

² *In re Jennings*, 1 Irish R. Eq. 236; *Hodges Railw.* 107.

³ *Bigelow v. Wilson*, 1 Pick. 485, opinion of WILDE, J.

vice might be made, it would be competent to summon the company,* by service upon any officer, superintendent, or managing agent of the company within the precinct, and service was made upon the freight agent of the company, it was held competent for the company to defeat the service and jurisdiction of the court by showing that they had a director within the precinct, upon whom service should have been made.¹ (a)

¹ *Wheeler v. New York & Harlem Railroad Co.*, 24 Barb. 414; *supra*, § 255, note 5. In Iowa, a railway company may be sued in any county through which its road passes, or in which its corporate powers are exercised. *Richardson v. Burlington & Missouri River Railroad Co.*, 8 Iowa, 260. For the practice in Ohio, see *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563. These matters are generally regulated by statute in the different states. *Dixon v. Hannibal & St. Joseph Railroad Co.*, 31 Mo. 409; *Farnsworth v. Terre Haute, Alton, & St. Louis Railroad Co.*, 29 Mo. 75; *Sprague v. Hartford, Providence, & Fishkill Railroad Co.*, 5 R. I. 233; *Sullivan v. La Crosse & Minnesota Packet Co.*, 10 Minn. 386; *New Albany & Salem Railroad Co. v. Tilton*, 12 Ind. 3; *Ohio & Mississippi Railroad Co. v. Boyd*, 16 Ind. 438; *Peoria Insurance Co. v. Warner*, 28 Ill. 429. In *Connecticut Mutual Life Insurance Co. v. Cleveland, Columbus, & Cincinnati Railroad Co.*, 41 Barb. 9, it was held, that where bonds and coupons, though executed in Ohio, were payable in New York, the cause of action arose in the latter state, and its courts would have jurisdiction, even though both parties might be foreign corporations. And see *Harris v. Somerset & Kennebec Railroad Co.*, 47 Me. 298. See *Taft v. Mills*, 5 R. I. 393. Service of summons on a travelling agent of an insurance company, or on one authorized only to effect insurance, is not a valid service on the company. *Parke v. Commonwealth Insurance Co.*, 44 Penn. St. 422. See *Kennard v. Railroad Co.*, 1 Phila. 41; *Ohio & Mississippi Railroad Co. v. Quier*, 16 Ind. 440. As to the English practice, see *In re Unity General Assurance Association*, 11 W. R. 355; *In re London & Westminster Wine Co.*, 9 Jur. n. s. 1102; *In re National Credit & Exchange Co.*, 7 Law T. n. s. 817; *Keynsham Blue Lias Lime Co. v. Baker*, 2 H. & C. 729.

It is not competent to give jurisdiction to the courts of another state over corporations not incorporated there, or having any business agency there, by the service of process on the president of the company; and if judgment were entered by default in an action against the company, so brought, the same would be stricken off by the court, whenever brought to its notice. *Buck v. Ashuelot Manufacturing Co.*, 4 Allen, 357.

(a) The service of process on corporations is mainly regulated by statute, and the decisions all turn on the statutory provisions. It can be of little use, therefore, to attempt a statement of the various rules. It may be remarked, however, that, in general, in proceedings against domestic corporations, provision is made for service on local agents. But this, though general, is not universal; and for the procedure in any particular jurisdiction resort should be had to the local statute for the precise rule.

*CHAPTER XL.

PLEADING.

SECTION I.

Declaration. — Motion in Arrest.

§ 259. It is not intended to give even an outline of the pleadings in actions affecting railways. That would carry us quite too far into the general subject of pleading, which is now falling into disregard, if not into disrepute, in this country, and in regard to which, like everything else here and everywhere, more or less, there is no backward step.

But we have deemed a brief reference to some of the more practical points decided, since railways have engrossed so much of the business of the country, in relation to the necessary forms of pleading, as not unworthy of notice.

It has been held, that in a declaration for injuries to animals, the general allegation that the plaintiff's animal was upon defendants' road, and there negligently and carelessly run over and killed by their train, is sufficient; and that such declaration is good, after verdict, even although it may have appeared on trial that the negligence of defendants consisted in defect of fences, and not in the management of the train; that questions of variance between the declaration and proof should have been taken on trial, and cannot be raised in arrest of judgment; that judgment will not be arrested after verdict for any defect in the pleading which might be fatal on demurrer, if, from the pleadings and the course of the trial, as shown by the exceptions, it is manifest that the requisite facts, defectively stated or omitted in the pleadings, were proved on trial; and that it is not necessary to allege that plaintiff was without fault.¹

* *Indebitatus assumpsit* is a proper form of action to recover money due upon subscription to stock in a railway.²

¹ *Smith v. Eastern Railroad Co.*, 35 N. H. 356; *Oldfield v. New York & Harlem Railroad Co.*, 14 N. Y. 310.

² *Peake v. Wabash Railroad Co.*, 18 Ill. 88.

The conductor of a railway train is a special agent of the company, and service may be made upon them through him, under the statute of Indiana.³

Under the English practice, where in an action for calls upon subscription to stock the declaration sets out in detail the authority for making such calls, it is competent for the defendant to plead "never indebted," thus putting the plaintiff upon the proof of his entire declaration.⁴

In an action on the case against a railway company for damage caused to a horse by the neglect to fence their road, by reason whereof the horse escaped and went at large, and thereby received such injury, the declaration stated that the defendants neglected to keep a suitable fence along their track, and for want of "such fence the plaintiff's horse escaped from his pasture and went at large, and by means of going at large as aforesaid the horse was greatly injured;" and it was held that, although the declaration might be bad on demurrer, it was sufficient on a motion in arrest of judgment after verdict for the plaintiff.

In an action for default of common carriers in not transporting perishable goods in a reasonable time, whereby the same were spoiled, it was held sufficient to allege the delivery on board the defendant's boat of certain poultry, and the receipt of the value by him for transportation to New York on the same day, and that the defendant did not proceed to New York with the same on that day, nor within a reasonable time afterwards, "but so negligently conducted himself in that behalf, that said poultry was not conveyed to New York and delivered there, until the same, in consequence of such negligence, became spoiled."⁵ In alleging negligence of defendants, it will be sufficient to charge gross negligence, to meet every shade of proof; since such allegations are not required to be proved to the full extent, nor will such an allegation preclude the plaintiff from recovery of common carriers for a breach of duty short of negligence.⁶

In an action founded on the duty to build fences by a railway company, brought against the receivers and trustees of the same under mortgage, enough must be alleged to show that the defend-

³ *New Albany Railroad Co. v. Grooms*, 9 Ind. 243.

⁴ *Welland Railway Co. v. Blake*, 6 H. & N. 410.

⁵ *Peck v. Weeks*, 34 Conn. 145.

⁶ *Sargent v. Birchard*, 48 Vt. 570.

ants were operating the road under such circumstances as to have assumed the statutory duty of maintaining the fences. But if it is alleged, that the injury occurred by reason of the carelessness * of the defendants and their servants in driving an engine or locomotive, whereby the same ran against and killed the plaintiff's cattle, it shows a good cause of action at common law.⁷

The personal representative of the place of the domicile of the deceased cannot maintain an action for an injury resulting in the death of the decedent, upon the ground that a statute of the state where the injury occurred gives a remedy for the injury to the personal representative for the benefit of the widow and next of kin.⁸

Where a railway company accepted a deed of land exempting the grantor from all risk as to fires caused by the road passing through the land, a declaration averring those facts, and that the company thereby assumed all risk of fires, and built and operated the road, and that, by reason of the careless management of their engines, the plaintiff's timber land was set on fire, was held sufficient on special demurrer.⁶

⁷ *Cooley v. Brainerd*, 38 Vt. 394. An allegation of duty, without stating the facts on which the duty arises, is immaterial in pleading and of no force. *Hewison v. New Haven*, 34 Conn. 136.

⁸ *Richardson v. New York Central Railroad Co.*, 98 Mass. 85; *Woodard v. Michigan Southern & Northern Indiana Railroad Co.*, 10 Ohio St. 121; *Needham v. Grand Trunk Railway Co.*, 38 Vt. 294.

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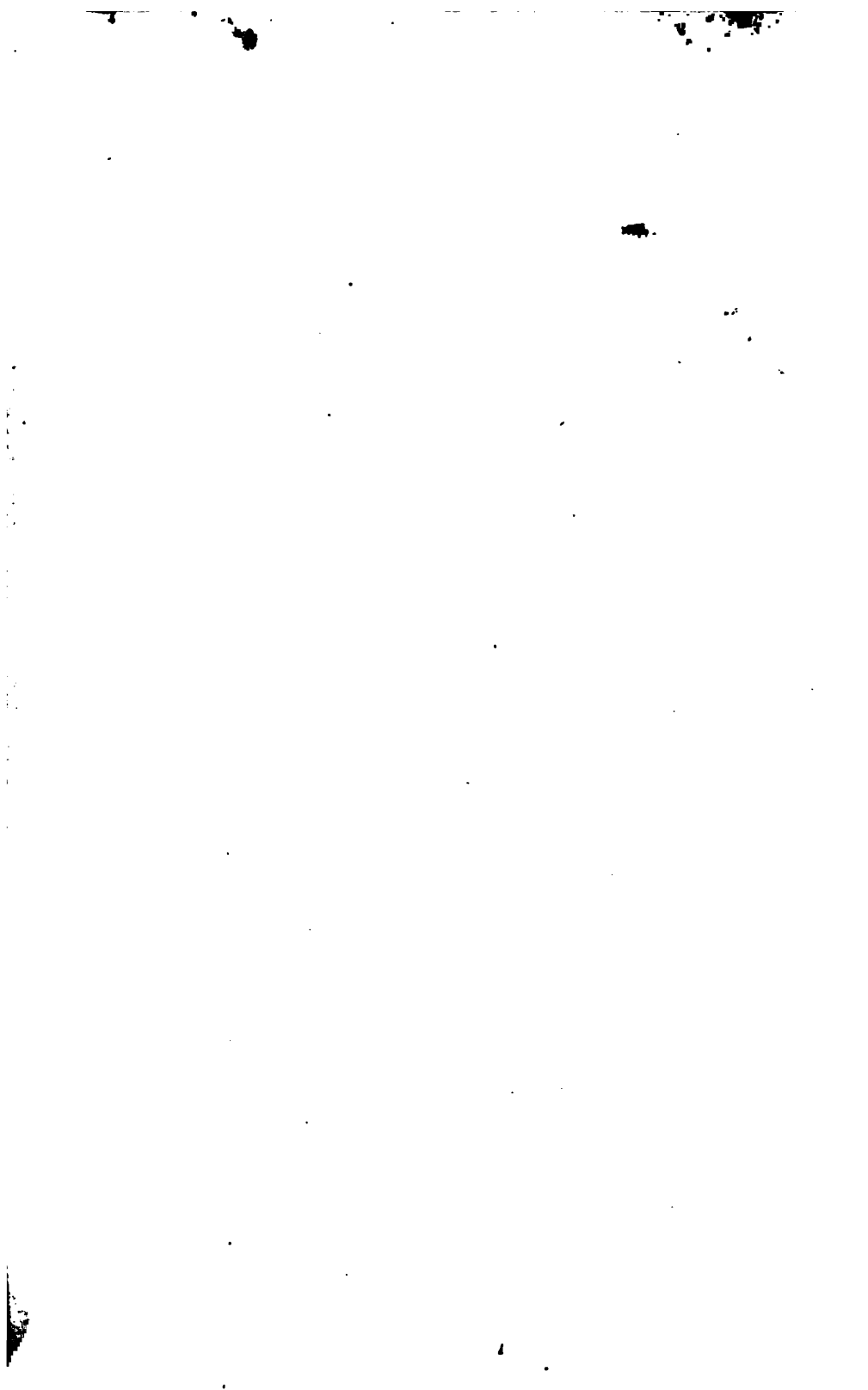
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